INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain jurisdiction	2
Statute of the Commonwealth of Pennsylvania, the validity of which is involved	2
Date of judgment sought to be reviewed and of application for appeal	6
Statement of the Nature of the Case	6
Authorities believed to sustain jurisdiction	9
Authorities showing question is substantial	9
Appendix "A"—Majority Opinion of the Supreme Court of Pennsylvania—Middle District	11
Appendix "B"—Dissenting Opinion of Justice Bell, Associate Justice of the Supreme Court of Pennsylvania, Middle District	21
Appendix "C"—Opinion of the Court of Common Pleas of Dauphin County, Pennsylvania	30

Table of Cases Cited

Concordia Insurance Company v. *Illinois*, 292 U.S. 535	10
Connecticut General Life Insurance Company v. *Johnson*, 303 U.S. 77	9
Gast Realty and Investment Company v. *Schneider Granite Company*, 240 U.S. 55	10
Ingels v. *Morf*, 300 U.S. 290	9
Interstate Transit, Incorporated v. *Lindsey*, 283 U.S. 183	9
Nichols v. *Coolidge*, 274 U.S. 531	10
Spector Motor Service v. *O'Connor*, 340 U.S. 602	9
Standard Oil Company of California v. *Johnson*, 316 U.S. 481	9
Untermeyer v. *Anderson*, 276 U.S. 440	10
Welch v. *Henry*, 305 U.S. 134	10

Statutes and Other Authorities Cited

	Page
Pennsylvania Law 694 (Act of June 22nd, 1931):	
Section 1	2
Section 2	3
Section 3	3
Section 9	4
Pennsylvania Law 1761 (Act of December 27th, 1951):	
Section 3	5
Section 9	5
United States Code, Title 28, Section 1257, Act of June 25th, 1948, c. 646, 62 Stat. 929, 28 U.S.C.A. Section 1257, F.C.A. 28 Section 1257	2

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DIVISION

No. 25—May Term, 1953

INTERSTATE MOTOR FREIGHT SYSTEM, INC.,
Appellant,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AT No. 2024 EQUITY DOCKET, COMMONWEALTH DOCKET No. 94, 1952.

JURISDICTIONAL STATEMENT FILED PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

To the Honorable, the Chief Justice of the Supreme Court of Pennsylvania:

Interstate Motor Freight System, Inc., Appellant in the above entitled case and Petitioner for the Allowance of an Appeal to the Supreme Court of the United States from final judgment of the Supreme Court of Pennsylvania in

this cause, herewith respectfully presents a separate, typewritten statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Pennsylvania, said statement being filed pursuant to Rule 12 of the Supreme Court of the United States.

Statutory Provision Believed to Sustain Jurisdiction

1. Title 28, United States Code, Section 1257, Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. A. Section 1257, F. C. A. 28 Section 1257, provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> (1) .....
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statute of the Commonwealth of Pennsylvania, the Validity of Which Is Involved

2. The statute of the Commonwealth of Pennsylvania, the validity of which is involved in this cause, is the Act of June 22, 1931, P. L. 694, as last amended by the Act of December 27, 1951, P. L. 1761. The said Act of 1931, as amended, prior to the said amendment of 1951, contained the following pertinent provisions:

> "*Section 1.* Be it enacted, &c., That the word 'company,' as used in this act, shall be construed to mean any individual who, or copartnership, corporation, joint-stock association, or association of individuals whatsoever which, shall engage in the business of carrying passengers or property for hire over the high-

ways of this Commonwealth in motor vehicles or trackless trolleys. For the purposes of this act, the term 'motor vehicle' shall be construed to mean every vehicle which is self-propelled, except such as move upon or are guided by a track erected upon the highways.

Section 2. Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each such company shall, on or before the first day of February of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: (1) The name and address of the company owning or operating such motor vehicle or vehicles; (2) the location of the principal place of business of such company; (3) the name and address of the person in this Commonwealth upon whom service of process or other notice may be had against such company; (4) a schedule, if any, or, if not, a description of the routes over which such company shall have operated over highways in this Commonwealth during the period for which the report is filed; (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; and (7) the amount of gross receipts of such company from all sources upon its operations during the period for which the report is filed, and such other relevant information as the Department of Revenue may require in connection with the settlement of the excise tax hereinafter provided, for the calendar year immediately preceding the first day of January of each year.

Section 3. The amount of excise tax annually to be paid by each company specified in section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a

company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles. In the event, however, that an excise tax shall be paid by any company to any city of this Commonwealth for the use of its highways, during the period for which the report is filed, the amount of such tax, so paid, may be deducted from the amount of tax payable to the Commonwealth, as above computed, upon satisfactory proof to the Department of Revenue of such payment; and, in addition thereto, where any such company shall have paid to the Department of Revenue a registration fee or fees, as provided for by the laws of this Commonwealth, upon any motor vehicle or motor vehicles used in the business of carrying passengers or property for hire over the highways of this Commonwealth, it shall receive a credit in each settlement for gross receipts tax made hereunder to the extent of the total amount of the registration fee or fees paid for the calendar year of which the period covered by the settlement was a part.

"*Section 9.* All taxes, penalties, interest, and bail forfeited which shall be received, recovered, paid, or collected under the provisions of section three, division (1) of this act, from companies operating routes which are entirely within the limits of this Commonwealth, shall be paid into the State Treasury, through the Department of Revenue, and credited to the General Fund; and all taxes, penalties, interest, and bail forfeited which shall be received, recovered, paid, or collected under the provisions of section three, division (2) of this act, from companies operating over routes

when only a part of such routes lies within the Commonwealth, shall be paid into the State Treasury, through the Department of Revenue, and credited to the Motor License Fund."

The said Act of 1951 amended, *inter alia*, Sections 3 and 9 so as to read as follows:

"*Section 3.* The amount of excise tax annually to be paid by each company specified in section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles.

Section 9. All taxes, penalties, interest, and bail forfeited which shall be received, recovered, paid, or collected under the provisions of section three of this act, shall be paid into the State Treasury, through the Department of Revenue, and credited to the General Fund."

Section 3 of the said Act of 1951 provides:

"*Section 3.* The provisions of this act shall become effective immediately upon final enactment, and shall apply to the excise tax imposed and payable hereunder for the calendar year one thousand nine hundred fifty-one and thereafter."

Date of Judgment Sought to Be Reviewed and of Application for Appeal

3. The judgment sought to be reviewed was entered by the Supreme Court of Pennsylvania on November 17, 1953 and a Petition for Reargument was refused by said Court on December 30, 1953. The application for appeal to the Supreme Court of the United States was presented on the twenty-second day of January, 1954.

Statement of the Nature of the Case

4. On May 5, 1952 Petitioner filed a Bill of Complaint for Injunction against the Defendant-Appellees in the above entitled case in the Court of Common Pleas of Dauphin County, praying that an injunction be issued enjoining and restraining said Defendant-Appellees from enforcing the provisions of the aforesaid Act, as amended, and that said Act be decreed to be unconstitutional and void. The Bill averred, *inter alia,* that the said Act is repugnant to the Constitution of the United States, as follows:

> "20. Plaintiff is advised by counsel, believes, and therefore avers that the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, Act No. 469, is unconstitutional, illegal, and void, for the following reasons:
>
> (a) It violates the Commerce Clause of Article I, Section 8, of the Constitution of the United States, in that the tax which it levies upon interstate commerce is not levied as compensation for the use of the highways and/or to defray the expense of regulating motor traffic, but is levied as a mere revenue measure, and even if said tax were imposed for such a proper purpose the tax thus exacted is excessive, bears no reasonable relation to the privilege of using the highways of the State, is discriminatory, and is so large as to obstruct interstate commerce, and, as

applied to the plaintiff, is oppressive, discriminatory, and unduly burdensome and does unduly interfere with and restrict the exercise of the privilege granted to the plaintiff by the Interstate Commerce Commission to operate over routes in interstate commerce.

(b) .....

(c) It violates Article XIV, Section 1, of the Constitution of the United States, and Article I, Section 1, and Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania, in that although such amendatory Act No. 469 was not enacted until December 27, 1951, it imposes a substantial tax upon the plaintiff retroactively upon its gross receipts for the entire calendar year of 1951.

(d) .....

(e) It violates Article XIV, Section 1, of the Constitution of the United States and Article 9, Section 1 of the Constitution of the Commonwealth of Pennsylvania, in that the same tax is levied upon transportation over the Pennsylvania Turnpike, for which use tolls must be paid, as is levied for transportation over other highways, for which no tolls are paid; in that the tax is not imposed upon transportation over the highways while carrying the mails; and in that the tax levied therein applies solely to those carrying property for hire and not to those regularly carrying property in their own business—thus, in each instance causing and resulting in an inequality of tax burdens and in discrimination among taxpayers'' (78a-80a).

5. The Defendants filed Preliminary Objections in the nature of a demurrer to the said Bill of Complaint and the Court of Common Pleas sustained the demurrer and dismissed the Plaintiff's Bill of Complaint by its Order of January 12, 1953.

6. The Opinion of the Court of Common Pleas set forth each of the Plaintiff's above stated contentions with respect

to the repugnancy of the said Act to the Constitution of the United States (99a-103a) and concluded that these contentions were without merit and that the said Act did not violate these provisions of the United States Constitution in any respect (the Opinion appeared in the Record at page 97a).

7. The Petitioner thereupon appealed to the Supreme Court of Pennsylvania, where this case was consolidated, for the purpose of appeal, with *Shirks Motor Express Corporation* v. *Otto F. Messner, et al.*, at No. 22, May Term, 1953, one brief being filed for Appellants and Appellees, respectively. Pursuant to the rules of the Supreme Court of Pennsylvania requiring parties to state the questions involved, Petitioner, in its brief (page 1), stated the said Federal questions in the following words:

> "1. Does the Act of June 22, 1931, P. L. 694, as last amended by the Act of December 27, 1951, P. L. 1761, violate the Commerce Clause of Article I, Section 8, of the United States Constitution? Negatived.
>
> 2. . . . . .
>
> 3. Does the aforesaid Act, as amended, violate the Commerce Clause of Article I, Section 8, and Article XIV, Section 1, of the United States Constitution and Article IX, Section 1, of the Pennsylvania Constitution? Negatived.
>
> 4. Does the Act of December 27, 1951, P. L. 1761, violate Article XIV, Section 1 of the United States Constitution and Article I, Sections 1 and 9, of the Pennsylvania Constitution? Negatived."

The above stated Federal questions were argued at length before the Supreme Court of Pennsylvania (Appellants' brief, pages 6-46, 57-65, 68-74. Appellees' brief, pages 2-23, 34-48, 63-71, 73-103).

8. The Supreme Court of Pennsylvania by its judgment entered on November 17, 1953 expressly decided the ques-

tions respecting the validity of said statute, held that it was not repugnant to the Constitution of the United States, and sustained its validity.

Authorities Believed to Sustain Jurisdiction

9. Petitioner cites *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, and *Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, as sustaining the jurisdiction of the Supreme Court of the United States of this cause upon appeal.

Authorities Showing Question Is Substantial

10. The constitutional questions involved are substantial and Petitioner submits the following grounds for this assertion: This case was argued before the Supreme Court of Pennsylvania on April 20, 1953 and the decision was not handed down until November 17, 1953. The dissenting opinion filed by Mr. Justice Bell holds that the said Act of 1931, as amended in 1951, violates the Commerce Clause of the United States Constitution and as to interstate carriers is unconstitutional and void. Said dissenting opinion concludes that the tax imposed by said Act upon interstate carriers is not imposed as compensation for the use of Pennsylvania highways, because not one cent of the tax receipts is used directly or indirectly for highway use and for other reasons. It also concludes that the decision of the Court is contrary to decisions of the United States Supreme Court, including *Intersate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, *Ingels* v. *Morf*, 300 U.S. 290, and *Spector Motor Service* v. *O'Connor*, 340 U.S. 602. It is contended by Petitioner that this conclusion of Mr. Justice Bell is in full accord with the controlling decisions of the Supreme Court of the United States, including those above cited, while the majority opinion departs from those precedents and, by upholding this

Act, "makes meaningless the Commerce Clause . . . and the numerous decisions which maintain and support it" (Dissenting Opinion). Petitioner also contends that this decision by the Supreme Court of Pennsylvania, in upholding the said taxing statute under the Equal Protection Clause of the United States Constitution, disregards the controlling decisions of the Supreme Court of the United States, including *Gast Realty & Investment Company* v. *Schneider Granite Company*, 240 U. S. 55 and *Concordia Insurance Co.* v. *Illinois*, 292 U. S. 535. Petitioner also contends that the holding by the Supreme Court of Pennsylvania that a tax imposed upon the gross receipts of carriers as a charge for the use of the state's highways may be made retroactive for a year prior to the date of its enactment disregards the principle that a tax cannot be made retroactive where such tax could not reasonably have been anticipated by the taxpayer at the time of the voluntary Act which the statute later made the taxable event and overlooks the distinction between taxes in the category of income taxes and those in the category of gift taxes, contrary to decisions of the United States Supreme Court, including *Untermeyer* v. *Anderson*, 276 U. S. 440, *Nichols* v. *Coolidge*, 274 U. S. 531, and *Welch* v. *Henry*, 305 U. S. 134, 147.

11. A copy of every opinion filed in this cause is appended hereto.

Respectfully submitted,

FRANK A. SINON,
GEORGE S. NORCROSS,
Counsel for Petitioner.

RHOADS, SINON AND READER,
WARNER, NORCROSS AND JUDD,
Of Counsel.

APPENDIX "A"

MAJORITY OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

No. 22 May Term, 1953

SHIRKS MOTOR EXPRESS CORPORATION, *Appellant*,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the Judgment of the Court of Common Pleas of Dauphin County at No. 2015 Equity Docket, Commonwealth Docket No. 34, 1952.

No. 25 May Term, 1953

INTERSTATE MOTOR FREIGHT SYSTEM, INC., *Appellant*

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the Judgment of the Court of Common Pleas of Dauphin County at No. 2024 Equity Docket, Commonwealth Docket No. 94, 1952.

OPINION OF THE COURT

CHIDSEY, J.

The appellants, Shirks Motor Express Corporation and Interstate Motor Freight System, Inc., filed separate bills in equity against the Secretary of Revenue and the Auditor

General of the Commonwealth of Pennsylvania to enjoin them from enforcing the Act of June 22, 1931, P.L. 694, as amended by the Act of December 27, 1951, P.L. 1761, 72 PS § 2185 et seq., which imposes an excise tax on the gross receipts of common carriers by motor vehicle, on the ground that the Act, as amended, violates the Commerce Clause, the Equal Protection Clause and the Due Process Clause of the United States Constitution, and also violates certain provisions of the Pennsylvania Constitution. The defendants filed preliminary objections in the nature of a demurrer, which in each case were sustained, and the respective complaints dismissed.

Shirks Motor Express Corporation is a Delaware corporation registered to do business in Pennsylvania. It is engaged in the business of transporting property by motor vehicle as a common carrier. It is engaged in interstate transportation, pursuant to certificates issued by the Interstate Commerce Commission, over various routes and between various points in seven States, including Pennsylvania. It is also engaged to a limited extent in intrastate transportation, pursuant to a certificate issued by the Pennsylvania Public Utility Commission, over certain routes within Pennsylvania.

Interstate Motor Freight System, Inc. is a Michigan corporation. It is a common carrier engaged solely in interstate transportation of property by motor vehicles, pursuant to certificates issued to it by the Interstate Commerce Commission. It operates over various routes and between various points in fifteen States, including Pennsylvania. This plaintiff's bill in equity substantially duplicates the bill of Shirks Motor Express Corporation, but also alleges that the tax is unconstitutional because it is levied upon transportation over the Pennsylvania Turnpike, a State instrumentality, for which tolls are charged.

Both appellants pay to the Commonwealth taxes for liquid fuels and registration fees on their vehicles.

Appellants attack the constitutionality of the statute involved on many fronts. Their contentions may be roughly subdivided into two groups: (1) those aimed solely at the amendatory Act of 1951, and (2) those aimed at those por-

tions of the original Act of 1931 which were not affected by the 1951 amendment.

In its original form the Act of 1931 imposed a tax of 8 mills on each dollar of the gross receipts of motor carriers as an excise for the use of the public highways. Intrastate carriers were required to pay eight mills of the gross receipts from all operations and interstate carriers were required to pay ". . . eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period." The original Act also provided for credits against the amount of the tax for any tax paid to a city for the use of its highways and for registration fees paid to the Commonwealth. The Act of 1931 further provided that the tax receipts collected from interstate carriers should be paid into the Motor License Fund, while tax receipts collected from intrastate carriers should be paid into the General Fund of the Commonwealth. The Act of 1951 made two changes, (1) it eliminated the credit for payment of local taxes and registration fees, and (2) it provided that *all* tax receipts be paid into the General Fund.[1]

Appellants' first contention is that the Act of 1931, as amended, violates the Commerce Clause (Article I, Section 8) of the United States Constitution. Appellants' contention is based in part upon their construction of the above quoted portion of the statute to mean that the trucking companies are taxed upon the basis of physical location and extent of routes rather than miles operated. Such a construction is unwarranted. The title of the Act provides: "Imposing a tax on gross receipts as an excise on the *use* of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire." (Emphasis supplied). Use of the highways can be ascertained only from the number of miles operated,

[1] Thus tax receipts from intrastate carriers continued to be paid into the General Fund.

not from the physical layout of the routes. We adopt as correct the construction given to the statute by the Department of Revenue in administering the tax, that is, that the tax is based upon the number of miles operated, not the physical location and the extent of the routes. Cf. *Commonwealth v. Brinks, Incorporated*, 346 Pa. 296, 30 A. 2d 128.

It is well settled that a State does not have the power to tax interstate commerce as such: *Alpha Portland Cement Company v. Commonwealth of Massachusetts*, 268 U. S. 203; *Spector Motor Service, Inc. v. O'Connor, Tax Commissioner*, 340 U. S. 602. It is equally well settled that a State may, consistently with the Commerce Clause, impose upon vehicles engaged in interstate commerce a reasonable, nondiscriminatory tax as compensation for the use of its highways: *Dixie Ohio Express Co. v. State Revenue Commission et al.*, 306 U. S. 72; *Hendrick v. State of Maryland*, 235 U. S. 610; *Capitol Greyhound Lines et al. v. Brice, Commissioner of Motor Vehicles*, 339 U. S. 542. Both appellants and appellees concede these fundamental propositions, but disagree as to their application to the statute here involved.

Where a tax is imposed by a State upon carriers engaged in interstate commerce it must affirmatively appear that it is levied only as compensation for the use of its highways. This limitation upon the taxing power of a State has not been violated where the taxing statute discloses that the incidence of the tax is apportioned to the use of the State's highways or where the proceeds of the tax are apportioned directly or indirectly to highway purposes: *Clark et al. v. Poor et al.*, 274 U. S. 554; *Interstate Transit, Incorporated v. Lindsey, County Court Clerk*, 283 U. S. 183; *Morf v. Bingaman, Commissioner of Revenue for New Mexico*, 298 U. S. 407; *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana, et al.*, 332 U. S. 495 (1947), and cases cited therein. This is merely another way of stating the rule previously referred to, that is, that the tax is for the purpose of compensating the State for the use of its highways. [illegible] the proceeds of the tax are allocated directly or indirectly for highway uses, there can be no doubt that the purpose of the tax is compensa-

tion for the use of the highways. *Where the amount of the tax is reasonable and non-discriminatory, and apportioned so as to reflect the use of a State's highways, a State does not abdicate its right to exact compensatory taxes from vehicles engaged in interstate commerce because the proceeds of the tax are placed in a general fund, as was done in the instant case, rather than in a highway fund.* If appellants' argument were adopted, vehicles engaged in interstate commerce, which contribute largely to the depreciation of the highways, would pay only the motor fuel tax and registration fees, while similar carriers engaged in intrastate commerce, would, in addition, be subject to this excise tax. An interstate carrier may not base a constitutional objection solely upon the use made of the proceeds of the tax. This is a matter for the exclusive determination of the Legislature. If the tax is otherwise constitutional, the use to which the proceeds of the tax are allocated will not render it unconstitutional: *Morf v. Bingaman,* supra, at p. 412; *Aero Mayflower Transit Co. v. Commissioner,* supra; *Clark v. Poor,* supra; *Dixie Ohio Co. v. State Revenue Commissioner,* supra.[2] None of the cases cited by the appellants holds otherwise.

---

[2] In *Morf* v. *Bingaman,* 298 U. S. 407, Mr. Justice Stone said at p. 412: ". . . The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit, Inc.* v. *Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other."

In the *Aero Mayflower Transit Co. case,* 332 U. S. 495, Mr. Justice Rutledge said at p. 504: ". . . Both before and after the Interstate Transit decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others."

In *Clark* v. *Poor,* 274 U. S. 554, Mr. Justice Brandeis said at p. 557: ". . . It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is as-

Under the principles above set forth it is necessary to determine whether the formula set forth in the Act of 1931, as amended by the Act of 1951, is reasonably calculated to impose the tax only on that portion of the operation of interstate carriers which is effected by the use of highways within the Commonwealth of Pennsylvania, and whether the tax is nondiscriminatory and reasonable in amount. The numerator of the tax formula is the number of miles operated in Pennsylvania. The denominator is the total number of miles operated. The multiple is the gross receipts of the carrier from all of its operations. The tax of eight mills is imposed upon the result of this calculation. The statute under consideration provides a reasonably accurate and nondiscriminatory formula to reflect the use of highways within this Commonwealth. In all of the cases cited by the appellants, either there was no formula whatever or the formula did not reflect use of the highways.

The only other question to be answered with reference to appellants' contention that the Act of 1931 as amended violates the Commerce Clause is whether the amount of the tax is reasonable. The burden of proving that the tax is unreasonable is on the carrier: *Capitol Greyhound Lines v. Brice,* supra; *Clark, Director of Department of Motor Vehicles et al. v. Paul Gray, Inc. et al.,* 306 U. S. 583, and appellants have failed to carry that burden. It is true that the effect of that portion of the 1951 amendment which eliminated the credit for payment of local taxes and registration fees was the same as an increase in the amount of the tax which theretofore, because of those credits, was something less than eight mills. We do not regard a tax of eight mills on gross receipts apportioned to activities of interstate carriers within Pennsylvania as unreasonable, particularly since it has been held that an interstate car-

---

sessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

And in the *Dixie Ohio Co.* case, 306 U.S. 72, Mr. Justice Butler said at p. 77: ". . . The exaction is not to be deemed offensive to the commerce clause merely because the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds for purposes other than the construction, improvement, or maintenance of its highways. . . ."

rier may be required to contribute toward the cost of construction of highways as well as their upkeep: *Clark v. Poor*, supra. The fact that one of the appellants or other marginal truck carriers will operate at a loss if the tax is applied, if true for that reason, does not establish that the tax is unreasonable.

None of the arguments advanced by the appellants is sufficient to show that the Act of 1931 as amended by the Act of 1951 is violative of the Commerce Clause of the United States Constitution.

Appellants also contend that the portion of the 1951 amendment which requires that the proceeds of the tax in question be placed in the General Fund violates Article IX, Section 18 of the Constitution of Pennsylvania. Article IX, Section 18, which was adopted in 1945, provides: "All proceeds from gasoline and other motor fuel excise taxes, motor vehicle registration fees and license taxes, operators' license fees and other excise taxes imposed on products used in motor transportation after providing therefrom for (a) cost of administration and collection, (b) payment of obligations incurred in the construction and reconstruction of public highways and bridges shall be appropriated . . . and used solely for . . . public highways and bridges and air navigation facilities and costs and expenses incident thereto . . . and shall not be diverted by transfer or otherwise to any other purpose, . . ." The amendment clearly and specifically enumerates the taxes intended to be covered by it and appellants recognize that a strict construction of this constitutional provision excludes a gross receipts tax on motor vehicle carriers for hire, and argue that the amendment must be construed in the light of common understanding and the form of the question which appeared on the ballot when the proposed amendment was approved by the voters. The question on the ballot was: "Shall the State Constitution be amended by adding Section eighteen to Article nine, requiring the revenues from taxes and license fees on gasoline, motor fuels, motor vehicles and operators and other products used in motor transportation, shall be used solely for highways, safety thereon, air navigation facilities, costs and expenses incident thereto;

and permitting loans from such revenues to the Commonwealth only if repaid in the next fiscal year?". Appellants stress the words ". . . revenue from taxes . . . on . . . motor vehicles and operators . . .", and argue that the Act of 1931 imposed a gross receipts tax on operators of motor vehicles. But this argument proves too much and is self-defeating since the distinction between an owner's license and an operator's license is well known by almost all voters in Pennsylvania, and it cannot be said that by approving the amendment as the question appeared on the ballot the voters intended by the word "operators" to include owners of motor vehicles for hire. The tax in question is clearly not a tax on motor vehicles as such, nor is it a tax on "operators" as that word is commonly understood.

III
Pet.

Appellants further contend that the tax in question violates the Equal Protection Clause of the United States Constitution, and the Uniformity Clause of the Pennsylvania Constitution. This contention is based in part upon appellants' erroneous construction of the statute which has been previously referred to and which requires no additional comment, and also upon the fact that the tax is applied to gross receipts arising from use of the Pennsylvania Turnpike for which a compensatory toll is also charged. Appellants argue that a carrier who uses the Turnpike for a given number of miles of its operation must pay a toll in addition to the tax, whereas another carrier who operates for an equal number of miles but does not use the Turnpike pays only the tax, and therefore there is lack of uniformity in the operation of the tax. The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth: Act of May 21, 1937, P. L. 774, Section 4, 36 PS § 652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality. Two others are the William Penn Highway and the Lincoln Highway. No motor carrier is restricted to the use of the Turnpike to the exclusion of either of such other two routes. If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice can not provide the foundation for a constitutional argu-

ment. The choice is obviously made because the amount of the toll is less than savings in operations resulting from a shorter route, few and very slight grades which make it possible to carry loads up to the legal limit, absence of intersections and savings in fuel and time. Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. A taxpayer can not voluntarily assume a burden and then be heard to say that it is unconstitutional. There is no merit in this contention.

IV Due Proc

Appellants' last contention is that the 1951 amendment violates the Fourteenth Amendment, or Due Process Clause of the United States Constitution, and Article I, Sections 1 and 9 of the Constitution of Pennsylvania, which together appellants construe to be the Pennsylvania due process requirement. This contention is based upon the retroactive effect of that portion of the 1951 amendment which had the effect of increasing the amount of the tax by eliminating the credits formerly allowed for registration fees and local use taxes. The amendment was approved on December 27, 1951, but the Act provides that it shall be applied to gross receipts for the calendar year 1951. The taxing power of the Legislature is very broad and includes power to enact taxes which are retroactive in effect as well as the power to retroactively increase taxes. Many Pennsylvania cases have sustained the exercise of this power and the United States Supreme Court has approved retroactive taxes since *Stockdale v. The Insurance Companies*, 20 Wall. 323 (1874). In *Welch* v. *Henry et al.*, 305 U. S. 134, Justice Stone said at p. 148: ". . . For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. See Untermyer *v.* Anderson, supra, footnote 1 (276 U. S. 440, 72 L. Ed. 645, 48 S. Ct. 353). These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preexisting laws. This was notably the case with the

'Revenue Act of 1918,' enacted February 24, 1919, 40 Stat. 1057, and made applicable to the calendar year 1918, . . .".

Even though the nature and amount of the increase in the tax could not have been anticipated, the retroactive effect of the 1951 amendment does not constitute a denial of due process under either the United States or the Pennsylvania Constitution.

We have considered all of the contentions made and authorities cited by appellants, but deem further discussion unnecessary.

The decrees of the court below which dismissed the complaint in each of these two cases are affirmed at the cost of the respective appellants.

Mr. Justice Bell files a dissenting opinion.

APPENDIX "B"

DISSENTING OPINION OF JUSTICE BELL, ASSOCIATE JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA—MIDDLE DISTRICT

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

No. 22, MAY TERM, 1953

SHIRKS MOTOR EXPRESS CORPORATION, *Appellant*,

v.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania

Appeal from the Judgment of the Court of Common Pleas of Dauphin County at No. 2015 Equity Docket, Commonwealth Docket No. 34, 1952

No. 25, MAY TERM, 1953

INTERSTATE MOTOR FREIGHT SYSTEM, INC., *Appellant*,

v.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania

Appeal from the Judgment of the Court of Common Pleas of Dauphin County at No. 2024 Equity Docket, Commonwealth Docket No. 94, 1952

DISSENTING OPINION

BELL, *J.*:

Can a State tax interstate commerce by pretending that the tax is imposed as compensation for the use of its highways when not one cent of the tax (receipts) is used directly or indirectly for the highways—that is the basic question.

Expressed in other words, when an act wears a false face shouldn't the Courts look underneath the masquerade to see whether the hands and body are really Esau's even though the voice is Jacob's?

The lower Court sustained defendants' preliminary objections in the nature of a demurrer. Accordingly, all of the facts which are averred in the bill in equity are, for the purpose of this appeal, considered to be true and correct; but the correctness and truth of the pleaders' conclusions or averments of law are not admitted: *Narehood v. Pearson*, 374 Pa. 299, 96 A. 2d 895; *Carlin v. Pennsylvania Power & Light Co.*, 363 Pa. 543, 70 A. 2d 349.

Can a State lawfully tax carriers engaged in interstate commerce and if so, what are its powers and limitations? This question raises several constitutional questions which are so inter-related that they may be considered together.

"It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup *v.* Port of Mobile, 127 U. S. 640, 648; Kansas City Ry. Co. *v.* Kansas, 240 U. S. 227, 231 and cases cited:" *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 562. This principle has been reiterated in *Alpha Portland Cement Company v. Massachusetts*, 268 U. S. 203, 217; *Freeman v. Hewit*, 329 U. S. 249; *Joseph v. Carter & Weeks Stevedoring Co.* 330 U. S. 422; *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602; *Keystone Metal Company v. City of Pittsburgh*, 374 Pa. 323, 97 A. 2d 797; *Dixie Ohio Express Co. v. State Revenue Commission*, 306 U. S. 72; *Sprout v. South Bend*, 277 U. S. 163; *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183; *Gwin et al. v. Henneford*, 305 U. S. 434; *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U. S. 114.

Expressed in another way it is well settled, as the majority admit, that a State does not have the power to tax interstate commerce as such. In *Dixie Ohio Express Co. v. State Revenue Commission*, 306 U. S., supra, the Court said (page 76): "*It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce.*[3]

[3] Italics throughout, ours.

Sprout *v.* South Bend, 277 U. S. 163, 171. Interstate Transit, Inc., *v.* Lindsey, 283 U. S. 183, 185. Gwin, White & Prince, Inc. *v.* Henneford, 305 U. S. 434. . . ".

However, it is now equally well settled that a state may impose a fair, reasonable and non-discriminatory tax upon carriers who use its highways for the cost, maintenance, and other proper highway expenses *as compensation for the use* of its highways even though such carrier is engaged partly or exclusively in interstate commerce: *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245; *Dixie Ohio Express Co. v. State Revenue Commission,* 306 U. S. 72; *Clark v. Gray, Inc.,* 306 U. S. 583; *Capitol Greyhound Lines v. Brice,* 339 U. S. 542; *Aero Transit Co. v. Commissioners,* 332 U. S. 495; *Hendrick v. Maryland,* 235 U. S. 610.

Both the title and sec. 2 of the Act of June 22, 1931, as amended December 27, 1951, declare that the tax is an excise tax on gross receipts levied (as compensation) for the "use" of the highways. This declaration is entitled to weight, but if in reality, i.e., in its practical operation and effect, the tax is not what it purports to be, the realities control: *Interstate Transit, Inc. v. Lindsey,* 283 U. S. 183; *Arrott's Estate,* 322 Pa. 367, 185 A. 697; *Armour & Co. v. Pittsburgh,* 363 Pa. 109, 69 A. 2d 405; *Murray v. Philadelphia,* 364 Pa. 157, 71 A. 2d 280.

In *Sprout v. South Bend,* 277 U. S., supra, a city tax (duly authorized by the legislature) prescribing an annual license fee (varying with the seating capacity of the bus) on all vehicles using the city streets, was declared *unconstitutional* as to interstate carriers because the facts did not show that the proceeds of the license fees were to be in any part applied to the construction or maintenance of the city streets and hence the ordinance could not be justified as an excise tax for the use of the city streets.

In *Joseph v. Carter & Weeks Stevedoring Co.,* 330 U. S. 422, a New York City tax was declared invalid and *unconstitutional* as to persons engaged in interstate commerce, where the ordinance provided: "Imposition of tax. a. For the privilege of carrying on . . . within the city any trade, . . . or commercial activity . . ., every person shall pay an excise tax . . . upon all receipts received in and/or allocable to the city from such . . . trade, . . . or commercial activity . . .

carried on by him . . ." The Court said (pages 429-430-433): "A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. Western Live Stock v. Bureau, 303 U. S. 250, 255. . . . The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—ad valorem, net income or excise. Cf. Western Live Stock v. Bureau, supra, 254.

" . . . in Gwinn, White & Prince, Inc. v. Henneford, . . . a state gross receipts tax on income from marketing fruit interstate was invalidated under the Commerce Clause. . . .

" . . . Stevedoring, we conclude, is essentially a part of commerce itself and therefore *a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid.* We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' Freeman v. Hewitt, supra, p. 256."

To summarize: A State cannot tax directly or by subterfuge interstate commerce as such, nor can it tax a person or corporation for the privilege of engaging in interstate commerce.

Moreover, the burden of proving that the tax on interstate commerce is imposed as compensation or reimbursement for the cost of the construction or maintenance or use of its highways is upon the State: *Ingels v. Morf*, 300 U. S. 290, 294; *Sprout v. South Bend*, 277 U. S. 163, 169, 170; *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 186; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259; *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 267.

As the majority opinion admits: "Where a tax is imposed by a State upon carriers engaged in interstate commerce, it must affirmatively appear that it is levied only as compensation for the use of its highways." How can it "affirmatively appear that the tax is levied only as compensation for the use of its highways" when the demurrer admits

that none of the tax (or tax receipts) are used directly or indirectly for the cost, maintenance or use of the State's highways.

Under the majority opinion, a State can tax interstate commerce at will and constitutionally justify it merely by reciting in the Act that the tax is imposed for use of the highways, even though not a penny is used directly, indirectly, or in practical operation and effect, for use of the highways. This makes a mockery of the interstate commerce clause and is likewise, in our judgment, contrary to the decisions of the Supreme Court.

Ingels v. Morf, 300 U. S. 290, is so similar on its facts to the instant case, i.e., in its disposition of the tax receipts, that its language is equally applicable to and governs it. In that case a California caravan act imposed a fee of $15.00 for the transportation or towing from without the state of any vehicle for the purpose of offering the same for sale to a purchaser within the state. The act directed *the fee collected should be paid into the general fund of the state treasury* to reimburse the treasury for the expense of administration and enforcement of the act and the added expense of policing the highways. The act was declared *unconstitutional.* Mr. Justice STONE, delivering the opinion for a unanimous Court, said (page 294): "To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. Sprout v. South Bend, 277 U. S. 163, 169, 170; Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 186; Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, 259, Clyde Mallory Lines v. Alabama, 296 U. S. 261, 267. This may appear from the statute itself, Morf v. Bingaman, supra; Clark v. Poor, 274 U. S. 554, 557, *or from the use of the money collected,* to defray such expense. Hicklin v. Coney, 290 U. S. 169, 173; see Kane v. New Jersey, 242 U. S. 160, 168, 169; Aero Mayflower Transit Co. v. Georgia Public Service Comm'n, 295 U. S. 285, 289; compare Interstate Busses Corp. v. Blodgett, supra, 249.

"*Here appellant does not show that the fees collected are used to meet the cost of the construction or maintenance of*

its highways. Section 6 of the challenged act, which directs that the permit fees *be paid into the general fund* of the state treasury, is to be *contrasted* with other California statutes relating to motor vehicles, which exact license fees and taxes and direct that they be paid, at least in part, into special funds devoted to highway purposes. Motor Fuel License Act, sec. 13, Cal. Stat. 1923, c. 267, as amended, Cal. Stat. 1935, c. 264; Vehicle Code, sec. 776, 781, Cal. Stat. 1935, c. 27; Cal. Stat. 1935, c. 362, sec. 9 (a), 9(d). See Interstate Transit, Inc. v. Lindsey, supra, 188-190. *Appellants point to no statute appropriating any part of the general fund of the state treasury for highway purposes, . . .*"

This is exactly the factual situation that exists in Pennsylvania under the 1951 Amendment and Justice STONE's opinion is, we repeat, equally applicable to the instant case.

Another case which is so close on its facts to the instant case that it directly rules it, is *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183. In that case Tennessee imposed a "privilege" tax of $500.00 upon interstate motor buses graduated according to carrying capacity. The highways were maintained by the State out of its general funds and there was no discrimination between intra and inter state operators. The Court held the Act was unconstitutional because *a detailed examination of the statute* showed that the tax imposed was not compensation for the use of the highways, but for the privelege of doing an interstate bus business. Justice BRANDEIS, delivering the opinion of the Court, said (pages 185-186-188-189-190): "While *a State may not lay a tax on the privilege of engaging in interstate commerce,* Sprout v. South Bend, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. Kane v. New Jersey, 242 U. S. 160, 168-169; Clark v. Poor, 274 U. S. 554; Sprout v. South Bend, supra, pp. 169-170. As such a charge is a direct burden on interstate commerce, *the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense* of regulating motor traffic. . . . Hendrick v. Mary-

land, 235 U. S. 610, 612; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.

"*The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting sec. 4* of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the General Funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulations was inaugurated in 1915. At the same session, the legislature created a State Highway Commission with power to construct and maintain highways. In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one mill road tax, and authorizing the issue of bonds for the construction of highways and bridges, the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and maintenance of highways or bridges. The absence in sec. 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business.

" . . . But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be

tested by standards which generally determine the validity of taxes. *Being valid, only if compensatory, the charge must be necessarily predicated upon the use* made, or to be made, *of the highways of the State.* Clark v. Poor, supra. . . . We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

The original Act of 1931 was undoubtedly, as it purported to be, a tax imposed as compensation for the use of the highways. The Amendatory Act of 1951 eliminated the credits allowed in the 1931 Act for vehicle registration fees paid to the State and for city taxes paid for use of highways. But far more important, is the fact that *until the act of 1951,* sec. 9 of the Act of *1931* provided that taxes collected from intrastate operators should be credited to the general fund of the Commonwealth, *while taxes collected from companies doing an interstate business should be credited to the Motor License Fund.* Moreover, prior to the recent constitutional amendment of 1945, Art. IX, sec. 18, the legislature appropriated money for use of the highways and for the expenses of the highway department out of its general fund; and likewise used revenue derived from taxes on its highways for both highway purposes and general revenue purposes. This condition has been radically changed by the Act of 1951 and by the Constitutional Amendment of 1945 and by the greatly altered condition of the general fund and the highway fund. Section 9 of the Act of 1931, as amended by the Act of (December 27) 1951, now provides that *all taxes* collected under the amendatory act shall be paid into or credited to the *General Fund.*

Defendants' demurrer admits (1) that the highway fund has an enormous balance which is more than amply sufficient to pay for the cost and expense of constructing and maintaining roads, as well as the expenses of the highway department; and (2) that the legislature has not appropriated and does not appropriate any moneys out of the general fund for highway purposes; and (3) that the funds used for highway purposes are derived *solely* from registration fees, gasoline and other motor fuel excise taxes and similar fees and taxes, all of which go into the motor license fund and/or may be

used *solely* for public highways and costs and expenses incident thereto.

This is not a case where a part of the taxes collected from interstate carriers under the 1951 Amendatory Act are used for highway purposes; it is not a case where the taxes collected from interstate carriers are paid into a general fund or state treasury, out of which the legislature appropriates moneys for highway and other purposes; this is not a case where taxes collected from non-highway users are used for highway purposes and vice versa. *This is a case where admittedly not one cent of the taxes levied upon and collected from interstate carriers under this Amendatory Act of 1951 are used, directly, indirectly, or in practical operation and effect, for highway purposes or for the expenses of the highway department* [4]—this is a case where the hands are the hands of Esau but the voice is the voice of Jacob.

To hold under the facts which have been pleaded and admitted, that this tax is Constitutionally applicable to a bus carrier engaged solely in interstate commerce would be to nullify and make meaningless the Interstate Commerce Clause of the Federal Constitution and the numerous decisions which maintain and support it. I would therefore hold, under the authority of *Interstate Transit, Inc. v. Lindsey*, 283 U.S., *Ingels v. Morf*, 300 U.S., supra; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S., supra; and *Spector Motor Service, Inc. v. O'Connor*, 340 U.S., supra, that the Amendatory Act of 1951 violates the Commerce Clause of the Constitution and as to interstate carriers is unconstitutional and void.

---

[4] The Commonwealth must have believed that the Amendment of 1951 was unconstitutional because on August 21, 1953, the Act was amended and changed to provide that the tax receipts from intrastate commerce were to be paid into the State Treasury and credited to the General Fund, while all taxes paid by and tax receipts from interstate commerce were to be thereafter credited to the Motor License Fund.

APPENDIX "C"

OPINION OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

No. 2024 Equity Docket

No. 94 Commonwealth Docket 1952

INTERSTATE MOTOR FREIGHT SYSTEM, INC., *Plaintiff*

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, *Defendants*

OPINION

By the Court:

This proceeding in equity is before us on the defendants' preliminary objections to plaintiff's bill of complaint. According to the averments of the bill, the plaintiff is a Michigan corporation with its principal office at Grand Rapids, Michigan, and is engaged in the business of transporting property by motor vehicle for hire. The plaintiff operates as a common carrier solely in interstate transportation over various routes, including specified routes in Pennsylvania, in accordance with a certificate of public convenience issued by the Interstate Commerce Commission.

By the Act of June 21, 1931, P. L. 694, 72 P. S. 2183, et seq., as last amended by the Act of December 27, 1951, P. L. 1761, 72 P. S. PKT. PARTS 2185, there is imposed upon the plaintiff a tax on gross receipts as an excise for the use of the highways of this Commonwealth by motor vehicles in transporting property for hire. The Act of 1931, as amended by the Act of 1951, imposes (a) a tax of eight mills on the gross receipts of companies operating over routes which are en-

tirely within the limits of the Commonwealth; and (b) a tax of eight mills on the gross receipts of companies operating over routes where only a part of the routes are situate within the Commonwealth; in the latter instance the tax being levied on the apportioned gross receipts of any such companies as determined by the ratio of the number of miles of routes operated in this Commonwealth to the total number of miles of all routes operated within and without the Commonwealth. The Act of 1951 provides that all taxes, penalties, interest and bail forfeited, paid or collected under the provisions thereof shall be paid into the State Treasury and credited to the General Fund.[5]

The plaintiff maintains that the Act of 1931, as amended by the Act of 1951, as applied to motor carriers in interstate transportation, is unconstitutional. We are asked to enjoin the defendants, the Secretary of Revenue and the Auditor General of this Commonwealth, from enforcing the provisions of the Act, and to restrain these officials from settling any tax against the plaintiff, auditing any settlements thereof, and also from adjusting and collecting the tax imposed under the Act.

The defendants have filed preliminary objections to plaintiff's bill and maintain that the Act is constitutional in all respects.[6]

---

[5] The original Act of 1931 provided that all taxes, penalties, interest and bail forfeited, paid or collected from companies operating over routes entirely within the limits of this Commonwealth should be paid into the State Treasury through the Department of Revenue and credited to the General Fund; and that all such taxes, penalties, interest and bail forfeited, paid or collected from companies where only a part of such routes lie within the Commonwealth should be paid into the State Treasury through the Department of Revenue and credited to the Motor License Fund. Thus it can be seen that the amendment of 1951 made a change in the disposition of the moneys forfeited, paid or collected under the Act by requiring all such moneys to be paid into the General Fund. The Act of 1951 also eliminated deductions allowed under the Act of 1931 for excise taxes paid to any city of the Commonwealth, as well as credits for registration fees paid to the Department of Revenue.

[6] The defendants claim that the plaintiff has an adequate remedy at law and that therefore a court of equity is without jurisdiction to entertain this bill of complaint. We disagree with the defendants' contention on this point. Equity has jurisdiction to enjoin taxation where there is

Plaintiff's bill alleges that the Act of 1931, as amended by the Act of 1951, is unconstitutional because:

(1) The Act violates the Commerce Clause of the Federal Constitution, Article I, § 8, for the reason that:

(a) The tax thereby imposed is not levied as compensation for the use of the highways or to defray the expense of regulating motor vehicle traffic, but on the contrary is a mere revenue measure unrelated to the use made of the public highways by motor carriers.

(b) And even if the tax were imposed for a lawful purpose, the tax as thus exacted is excessive and bears no reasonable relation to the use of the highways of the State.

(c) The tax is discriminatory and is so large as to obstruct interstate commerce, and as applied to the plaintiff is oppressive and unduly burdensome in that it interferes with and restricts the exercise of the privilege granted to the plaintiff by the Interstate Commerce Commission to operate over routes in interstate commerce.

(d) The Secretary of Revenue is required to suspend the privilege of using the highways of this Commonwealth because of non-compliance with the Act, thus imposing a forfeiture on plaintiff's right to engage in interstate commerce.

(2) The amendment of December 27, 1951 violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and Article I, § 1, and Article I, § 9 of the Constitution of this Com-

---

no power to impose the tax. Where a bill in equity challenges the power of the State to tax because of the alleged unconstitutionality of the Act imposing the tax, then equity has jurisdiction. We have answered this same contention in two recent cases where we reviewed the authorities on this question: *Shirks Motor Express Corporation* v. *Otto F. Messner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania*, and *Weldon B. Heyburn, Auditor General of the Commonwealth of Pennsylvania*, No. 2015 Equity Docket, No. 34 Commonwealth Docket 1952; *Chester County Mutual Insurance Company, Countrymen's Mutual Fire Insurance Company*, and *Lykens Valley Mutual Fire Insurance Company* v. *Otto F. Messner, Secretary of Revenue, et al.*, 63 Dauphin 46 (1952).

monwealth, because it is made retroactive in its operation for the calendar year 1951.

(3) The Act violates Article IX, § 18 (amendment of November 6, 1945, P. L. 1418) of the Constitution of this Commonwealth, which requires that all proceeds from gasoline and motor fuel excise taxes, motor vehicle registration fees and license taxes, operators' license fees, and other excise taxes imposed on products used in motor transportation shall be appropriated by the General Assembly to agencies of the State or political subdivisions thereof, and used solely for construction, reconstruction, maintenance and repair of the public highways, bridges and air navigation facilities, etc., and shall not be diverted by transfer or otherwise to any other purpose.

(4) The Act violates the Uniformity Clause of Article IX, § 1 of the Constitution of this Commonwealth, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, because the tax applies solely to those carrying property for hire and not against those regularly carrying property in their own business.

(5) The amendment of December 27, 1951 violates Article III, § 3 of the Constitution of this Commonwealth (requiring the subject of a bill to be clearly expressed in its title), in that the Act of 1951 makes a complete change in the nature and purpose of the tax levied in the original Act of 1931, and imposes a new tax upon the plaintiff without giving notice thereof in the title.

These same contentions concerning the unconstitutionality of the Act of 1931, as amended by the Act of 1951, were considered by us in Shirks Motor Express Corporation v. Otto F. Messner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and Weldon B. Heyburn, Auditor General of the Commonwealth of Pennsylvania, No. 2015 Equity Docket, No. 34 Commonwealth Docket 1952.[7] In the Shirk case we reached the conclusion

[7] Now on appeal to the Supreme Court.

that the Act is constitutional. It would unduly burden this opinion to reiterate at length our reasons for that conclusion. Those reasons were all fully developed and set forth in our opinion in the Shirk case. We therefore do not sustain plaintiff's contention that the Act of 1931, as amended by the Act of 1951, is unconstitutional in any of the particulars hereinabove mentioned, and refer to our opinion in the Shirk case for our reasons for reaching this conclusion.

Plaintiff raises a point here that was not raised in the Shirk case. Plaintiff maintains that the Act of 1931, as amended by the Act of 1951, violates the Uniformity Clause, Article IX, § 1 of the Constitution of Pennsylvania, and the Equal Protection Clause, Article XIV, § 1 of the Constitution of the United States, in that the same tax is levied upon transportation over the Pennsylvania Turnpike, for which tolls must be paid, as is levied for transportation over other highways in this Commonwealth, for which no tolls are paid; resulting, it is claimed, in inequality of tax burdens and in discrimination among taxpayers contrary to these constitutional provisions.

Plaintiff's certificate of public convenience includes the route over the Turnpike from the Pittsburgh area to the Harrisburg area. The plaintiff's complaint avers that between Pittsburgh and Harrisburg the plaintiff operates on routes over public highways that are both north and south of and generally parallel to the Turnpike, namely, U. S. highway routes Nos. 22, 11 and 30.

It is entirely optional on the part of the plaintiff whether it will choose either the public highway routes that are entirely free, or the Turnpike for which tolls are charged. The expenditures which the plaintiff has made indicate that it considers it advantageous to make extensive use of the Turnpike, and since the plaintiff is in the business of transportation for hire, it is a fair inference that it feels there is an economic advantage in the use of the Turnpike rather than in the public highways.

Greater speeds are permitted upon the Turnpike than on other highways. In the construction of the Turnpike grades and curves have been eliminated or reduced, and the hazards

of intersecting traffic have been minimized. There are other factors that make travel over the Turnpike advantageous to commercial vehicles.

We are unable to follow the plaintiff's argument that the use of the Turnpike results in any inequality of tax burden where it appears that the free highways are available and that the plaintiff uses the Turnpike as a matter of choice. There is no averment that there is any inequality in the amount of the tolls charged. The plaintiff presumably pays the same toll as other motor vehicles of the same class operating in intrastate as well as interstate commerce.

Nor does the record, in our judgment, show that there has been any discrimination against the plaintiff on account of its voluntary use of the Turnpike. We must bear in mind that the tax in question is an excise for the privilege of using the highways; and with respect to interstate transportation it is levied on gross receipts of motor carriers attributable to business done in Pennsylvania, in accordance with a specified formula of apportionment.

Section 3 of the Act imposing the tax provides that "the number of miles of routes operated in this Commonwealth" is to be compared to "the total number of miles of all routes operated" for the purpose of determining the amount of tax on gross receipts from interstate transportation. Since the Turnpike is a certified route for the plaintiff, the route mileage over this roadway under the plain provisions of the Act comes within the apportionment formula.

Taxation is not an exact science, and accordingly exactness in apportionment is not required: Turco Paint & Varnish Company v. Kalodner et al., 320 Pa. 421, 429 (1936). An apportionment formula must produce fair and lawful results. Apportionment formulae have been approved in a wide variety of forms: United States Glue Company v. Town of Oak Creek, 247 U. S. 321 (1918); Underwood Typewriter Company v. Chamberlain, 254 U. S. 113 (1920); National Leather Company v. Massachusetts, 277 U. S. 413 (1928); West Publishing Company v. McColgan, 166 Pacific (2d) 861 (Cal., 1946), affirmed 328 U. S. 823 (1946); Central Greyhound Lines, Inc. v. Mealey et al., 334 U. S. 653 (1948); Turco Paint & Varnish Company v.

Kalodner et al., supra; Commonwealth v. Columbia Gas and Electric Corporation, 336 Pa. 209 (1939). It is an essential requisite here that the method of attributing gross receipts to Pennsylvania by means of this formula based on route ratios must result in equality among taxpayers.

In the Shirk case, supra, we have set forth our reasons for approving this formula, and we have already stated herein that we will not labor this point by reiterating those reasons. The only matter here for our consideration, in addition to the questions considered in the Shirk case, is whether the formula must be considered invalid as to the plaintiff because a part of its route mileage in Pennsylvania is over the Turnpike. The excise imposed by the Act is not measured by the exact miles traveled. The measurement of the excise as to interstate carriers is based on a comparison of routes within and without the State. When viewed in this light, we think it becomes clear why the route over the Turnpike is and should be included in the apportment formula.

The Turnpike is administered by the Pennsylvania Turnpike Commission which is an instrumentality of the Commonwealth: § 4 of the Act of May 21, 1937, P. L. 774, 36 P. S. 652d; Pennsylvania Turnpike Commission Appeal, 351 Pa. 139, 142 (1945). In § 15 of the Act of 1937, 36 P. S. 6520, it is provided that when all the bonds and interest shall have been paid, the Turnpike shall become a part of the system of State highways, and be maintained free of toll, and that all funds, machinery and equipment shall be vested in the Department of Highways.

The Commonwealth has a proprietary interest in this great thoroughfare. It is an interest, in our opinion, that is sufficient to justify the inclusion of Turnpike mileage in the formula for attributing gross receipts to this Commonwealth for the purpose of imposing an excise tax as compensation for the use of our highways.

The rule is that there must be uniformity in the rate of taxation and also uniformity in the method of assessment. The tax imposed here is at a uniform rate both with respect to intrastate carriers, interstate carriers, users and nonusers of the Turnpike. All interstate carriers are uni-

formly assessed on the basis of their mileage ratios. The fact that carriers choose to pay tolls for the advantages which they derive from the use of the Turnpike does not in our judgment derogate from the uniform manner in which the tax is assessed.

Counsel for the plaintiff have claimed that this tax is lacking in uniformity and have cited cases dealing with prohibited classifications under the Uniformity Clause of our State and Federal Constitutions. Actually, we think the question of classification is not involved with respect to users and non-users of the Turnpike, because there is nothing in the Act to show that the legislature classified carriers for tax purposes depending upon whether or not they used the Turnpike. It would serve no useful purpose to discuss at length the authorities dealing with the question of classification on this point, since no classification exists based on the use of the Turnpike.

In our judgment, the Act of 1931, as amended by the Act of 1951, is not lacking in uniformity in its application to interstate motor carriers making voluntary use of the Turnpike. This case in principle cannot be differentiated from the Shirk case, supra. We are convinced that our decision in the Shirk case controls the instant case in all its aspects.

In this case, therefore, we hold that the provisions of the Act of 1931, as amended in 1951, are applicable to the plaintiff, and that the plaintiff suffers no inequality in tax burden, nor is the tax imposed by the Act in any way discriminatory against the plaintiff. It is not shown that the use of the Turnpike mileage in the apportionment formula for interstate motor carriers constitutes a violation of the Uniformity Clause, Article IX, § 1 of the Constitution of Pennsylvania, or the Equal Protection Clause, Article XIV, § 1 of the Constitution of the United States. And in our judgment, there is no lack of uniformity because of the application of the Act of 1951 to the plaintiff in its voluntary use of the Pennsylvania Turnpike in interstate transportation, it appearing that toll free routes on our highways are available if the plaintiff chooses to use them. The defendants' preliminary objections to the bill of com-

plaint must therefore be sustained, except as to the defendants' claim that the plaintiff has an adequate remedy at law.

And now, January 12, 1953, it is ordered, adjudged and decreed that the plaintiff's bill of complaint be and the same hereby is dismissed at the cost of the plaintiff; the Prothonotary is directed to enter this decree and to notify the parties to this proceeding or their counsel forthwith.

(S.) WILLIAM H. NEELY,

J.

15

FEB 27 1954
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 606

INTERSTATE MOTOR FREIGHT SYSTEM, INC.,
Appellant,

vs.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Harry F. Stambaugh,
Special Counsel;

Frank F. Truscott,
Attorney General,
Counsel for Appellee.

INDEX

Subject Index

	Page
Appellees' statement opposing jurisdiction	1
Voluntary payment of tolls by the plaintiff does not amount to a discrimination against it or a denial of the equal protection of the laws to it	5
Plaintiff has failed to prove that the total amount of the gross receipts tax and the tolls on the turnpike is in excess of a fair compensation for the privilege of using the turnpike	7
Motion to dismiss or affirm	11

Table of Cases Cited

Aero Transit Company v. *Commissioners*, 332 U.S. 495	8, 9
Clark v. *Paul Gray, Incorporated*, 306 U.S. 583	8
Clark v. *Poor*, 274 U.S. 554	8
Great Southern Fireproof Hotel Company v. *Jones*, 177 U.S. 449	5
Interstate Busses Corporation v. *Blodgett*, 276 U.S. 245	8
Interstate Motor Freight System, Incorporated v. *Otto F. Messner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania* and *Weldon B. Heyburn, Auditor General of the Commonwealth of Pennsylvania*, 375 Pa. 461	2
Lehigh Valley Railroad Company v. *Commonwealth*, 145 U.S. 192	9
Pennsylvania Turnpike Commission v. *Smith*, 350 Pa. 355	3
Pennsylvania Turnpike Commission Appeal, 351 Pa. 139	3
Pennsylvania Turnpike Commission Land Condemnation Case, 347 Pa. 643	3

Statutes and Other Authorities Cited

Pennsylvania Law 774 (Act of May 21st, 1937):	
Section 4	2
Section 8	5
Section 11	3
Section 15	5
Pennsylvania Statutes, Volume 36, Section 65 2d	2

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT

No. 25—MAY TERM, 1953

INTERSTATE MOTOR FREIGHT SYSTEM, INC.,
Appellant,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellees

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AT No. 2024 EQUITY DOCKET, COMMONWEALTH DOCKET No. 94, 1952.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

This appeal involves the same statute as the appeal of Shirks Motor Express Corporation.

The statement opposing jurisdiction in the Shirks case covers all of the questions involved in this appeal of Interstate Motor Freight System, Inc., except one question, which is as follows:

May the tax be imposed from such portion of the gross receipts as is derived from transportation over the Pennsylvania Turnpike?

Appellees maintain that they can so tax because—

(I) The Pennsylvania Turnpike Commission is a part of the Commonwealth of Pennsylvania. It is an instrumentality of the Commonwealth, and the exercise of its powers is held to be an essential governmental function of the Commonwealth.

(II) Voluntary payment of tolls by the appellant does not amount to a discrimination against it or a denial of the equal protection of the laws.

(III) Appellant has failed to prove that the total amount of the gross receipts tax and the tolls on the turnpike are in excess of a fair compensation for the use of the turnpike.

Section 4 of the Act of May 21, 1937, P. L. 774, 36 P. S. Section 65 2d, provides:

> "That there is hereby created a commission to be known as the 'Pennsylvania Turnpike Commission' and by that name the commission may sue and be sued, plead and be impleaded, contract and be contracted with, and have an official seal. The commission is hereby constituted an instrumentality of the Commonwealth, and the exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth. * * *"

In its opinion in this case the Supreme Court of Pennsylvania said:

> "The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth: Act of May 21, 1937, P. L. 774, Section 4, 36 P. S. § 652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality. Two others are the William Penn Highway and the Lincoln Highway." (375 Pa. at 461)

The Supreme Court of Pennsylvania has repeatedly held that the Pennsylvania Turnpike is a part of the Commonwealth of Pennsylvania:

> Pennsylvania Turnpike Commission Land Condemnation Case, 347 Pa. 643 (1943), holding that the Turnpike Commission could appropriate the property of a *county* institution district without making compensation therefor. The Supreme Court reasoned that the Turnpike Commission was taking the property as an agent of the Commonwealth and there was no change of ownership;
>
> Pennsylvania Turnpike Commission v. Smith, 350 Pa. 355 (1944), holding that the Turnpike Commission was not liable to pay interest on an award of damages under a construction contract. The Court reasoned that the award against the Commission was within the rule that the Commwealth is not liable to pay interest;
>
> Pennsylvania Turnpike Commission Appeal, 351 Pa. 139 (1945), holding that the Pennsylvania Turnpike was a "State highway" within a statute fixing the compensation to be paid for coal left in place under a State highway.

Section 11 of the Act of May 21, 1937, creating the Turnpike Commission, provides that:

> "The accomplishment by the commission of the authorized purposes stated in this act being for the benefit of the people of the Commonwealth and for the improvement of their commerce and prosperity in which accomplishment *the commission will be performing essential governmental functions,* the commission shall not be required to pay any taxes or assessments on any property acquired or used by it for the purposes provided in this act, and the bonds or other securities and obligations issued by the commission, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation within the Commonwealth." (Emphasis added)

The Commission has none of the characteristics of a private corporation or business. No capitalists contributed to it. It had no shareholders.

The distinguishing feature of the Turnpike Commission is that it was created to carry out a self-liquidating project for the construction of a great highway—a highway which is to be paid for by the persons who use it.

A separate Commission was created for purely financial reasons, not governmental reasons; to segregate the funds borrowed to pay the costs of construction and the funds collected as tolls to repay the monies borrowed, so that the bonds should be adequately secured.

The Commonwealth, not the Commission, issued the bonds to provide funds to pay the costs of building the highway.

The fact that the bonds are payable only out of income from tolls does not prevent the bonds from being bonds of the Commonwealth. Business corporations frequently issue income bonds and no one doubts that they are the bonds of such corporations.

The provision in the first sentence of Section 4 the Turnpike Commission may sue and be sued is easily explained. plained.

The Commonwealth cannot be sued at all, unless it expressly consents, and then only upon the conditions attached to the consent conferred. Instead of providing simply that the Commonwealth might be sued, the Legislature limited the right to sue to bringing an action against the Turnpike Commission. The bonds were payable only out of income from tolls, not out of the general funds of the Commonwealth. Hence, the right to sue was permitted only against the Commission which would collect and have the income derived from the tolls and would pay a recovery therefrom.

This is all in keeping with the plan to make the turnpike

a self-liquidating project and was not intended to make the Turnpike Commission a separate corporation or entity.

In *Great Southern Fireproof Hotel Company* v. *Jones*, 177 U. S. 449 (1900) it was held that the capacity to sue and be sued did not show intent to create a corporation.

The Turnpike Commission holds the legal title to the right of way and of the highway built upon it, but the commission owns the same only in its capacity as "an instrumentality of the Commonwealth", and for the Commonwealth.

The bonds to be issued are bonds of the Commonwealth not of the commission (Sec. 8).

In order to provide a separate and definite security, the commission holds a legal title to the turnpike in much the same manner as a trustee under an indenture securing an issue of bonds, owns the title to land and other property which is the security for the bonds.

Section 15 of the Turnpike Act provides that when all the bonds and the interest thereon shall have been paid, the Commission shall be dissolved and all of the property of the Commission shall be vested in the Department of Highways of the Commonwealth. This is to take place without any conveyance or other legal formality.

In the decisions cited above, the Supreme Court of Pennsylvania has construed these and other provisions of the Turnpike Act and has held that the Pennsylvania Turnpike Commission performs essential governmental functions and is a part of the Commonwealth.

II

Voluntary Payment of Tolls by the Plaintiff Does Not Amount to a Discrimination Against It or a Denial of the Equal Protection of the Laws to It.

The Pennsylvania Turnpike is a super-highway. The construction of seven (7) tunnels, two more than a mile

long, and of enormous cuts and fills, enables a motor carrier to travel across Pennsylvania without climbing the steep grades necessary to cross ranges of mountains.

Two other State highways, the William Penn Highway and the Lincoln Highway, cross the State of Pennsylvania by routes roughly parallel with that of the Pennsylvania Turnpike. These two are free of tolls.

Every motor carrier has the right to use the Turnpike on equal terms. Whether the motor carrier uses the Turnpike or uses the William Penn Highway or the Lincoln Highway is entirely optional to it. There is no discrimination.

The carrier who elects to use the turnpike, obtains the unique advantages of that highway and pays the same rate of toll as any other carrier traveling on the turnpike does.

The difference made is not between carriers but between the highways which the carriers choose to travel.

Among the advantages which the turnpike offers for travel are the following:

A shorter route and haul than either the William Penn or Lincoln Highways can offer.

No mountains or hills to cross and a uniformly easy grade. Most of the grades are less than 2%; relatively few are 3%. This grade makes it possible for a truck to carry loads up to the full legal limit, which they could not do in crossing the Allegheny mountains on the William Penn or Lincoln Highways. Curves have a minimum sight distance of approximately 1000 feet, and no curve is greater than six degrees.

Saving in gasoline and in time of trucks and drivers.

Four 12 foot traffic lanes with 10 foot stabilized shoulders.

Roadside delineators throughout its entire length, improving the safety of night driving.

No cross traffic at grade at any point on the turnpike.

In addition, the cost of the turnpike, with its seven (7) tunnels and enormous cuts and fills far exceeds the cost of the William Penn Highway or the Lincoln Highway.

It is a known fact that the greater majority of carriers choose the turnpike in preference to the William Penn or Lincoln Highways. They do this because it is more profitable to the carrier to use the turnpike, even after allowing for the payment of the toll. The turnpike on the one hand and the William Penn and Lincoln on the other are alternative routes, but they are not comparable in the advantages afforded to a carrier.

III

Plaintiff Has Failed to Prove That the Total Amount of the Gross Receipts Tax and the Tolls on the Turnpike Is in Excess of a Fair Compensation for the Privilege of Using the Turnpike.

The decisions holding that this burden is on the carrier are cited in the statement opposing jurisdiction in the *Shirks Motor Express Corporation* case, p. 3.

Surely when the Commonwealth develops and executes a plan for the construction and operation of this turnpike, providing at greatly increased cost this super highway which offers so many economical and other advantages, it should not be penalized by the loss of the tax on gross receipts.

The toll was made low to encourage use of the turnpike. The value of the turnpike to the carrier is greater than the value of the use of any other highway in Pennsylvania, and the carrier may be taxed or required to pay a proportionately higher compensation therefor.

Plaintiff has failed to prove that the toll plus the tax exceeds a fair compensation for the use of the turnpike. Most convincing evidence of the value of the turnpike to the motor carriers is the fact that they use it as a regular

route. They could operate their trucks over the William Penn or Lincoln Highways without any toll or other charge. Yet they prefer to operate over the turnpike and pay the tolls.

The difference in the value of the use of the turnpike over the value of the use of the alternative highways must equal more than the tolls charged.

Every mile of traffic over the turnpike is optional and voluntary. The carriers have the option of using either one of two free highways. Hence there is no burden on interstate commerce.

The fact that carriers elect to travel the turnpike is a demonstration that it is well worth their while; and that the advantages of the turnpike more than make up for the payment of the toll.

Plaintiff has wholly failed to prove what would be a fair compensation for the use of the turnpike or for the use of the William Penn or Lincoln Highways. It has not shown what the tolls on the turnpike amount to per ton of freight carried by it. Weight carried is still a necessary element in determining a fair compensation for use of the highway. Many trucks haul loads in excess of the legal limit over the turnpike, and cause damage which increases the cost of repair and maintenance.

In determining a reasonable compensation, the State may take into consideration the cost of constructing a highway:

Clark v. *Poor*, 274 U. S. 554, 557 (1927);

Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 250 (1928);

Aero Transit Company v. *Commissioners*, 332 U. S. 495, 503, 504 (1947).

This Commonwealth is not required to compute, with mathematical precisions, the cost of constructing, maintaining and operating the turnpike:

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, 599 (1939).

In *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495, the Supreme Court sustained a tax of 2% on gross receipts of a motor carrier for use of highways in Montana.

This tax of 2% exceeds the Pennsylvania tax of 8 mills by the difference of 1.2%. Appellant has failed to prove that the toll on the turnpike exceeds 1.2% of the gross receipts. In any event, the appellant has not proved that the compensation of 8 mills plus the tolls exceeds the fair compensation for the use of this super-highway.

Pennsylvania has imposed taxes ranging from 8 to 28 mills per annum upon the gross receipts of railroads apportioned according to mileage in Pennsylvania. See *Lehigh Valley Railroad Co.* v. *Commonwealth*, 145 U. S. 192.

These railroads provide their own roadbeds at enormous costs. Motor carriers are furnished highways built and maintained at public expense. Motor carriers also compete with railroad and express companies and cannot justly complain against paying this tax. The tax also provides protection to their property and business.

If a party operates its trucks over the William Penn or Lincoln Highways, the party will pay only 8 mills on tax gross receipts. But the use of the turnpike is worth much more than the use of these other highways. The carrier is willing to pay toll voluntarily in order to realize the saving and the resulting increased profit which it gains by doing so.

The carrier could not haul the greater loads over the mountains crossed by the William Penn and Lincoln Highways.

Respectfully submitted,

HARRY F. STAMBAUGH,
Special Counsel;
FRANK F. TRUSCOTT,
Attorney General,
Counsel for Appellee.

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT

No. 25—MAY TERM, 1953

INTERSTATE MOTOR FREIGHT SYSTEM, INC.,
Appellant,

vs.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania,
Appellees

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AT No. 2024 EQUITY DOCKET, COMMONWEALTH DOCKET No. 94, 1952.

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, the Commonwealth of Pennsylvania and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument. In sup-

port of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

HARRY F. STAMBAUGH,
Special Counsel;

FRANK F. TRUSCOTT,
Attorney General,
Counsel for Appellee.

(3757)

16

FILED
MAR 6 1954
HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1953

No. 606

INTERSTATE MOTOR FREIGHT SYSTEM, INC.,
Appellant

vs.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

FRANK A. SINON
RHOADS, SINON & READER
State Street Building
Harrisburg, Pennsylvania

GEORGE S. NORCROSS
WARNER, NORCROSS & JUDD
Michigan Trust Building
Grand Rapids, Michigan
Counsel for Appellant

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX TO BRIEF

	Page
I. Introduction	1
II. Statement of the Case	3
III. Argument:	
A. The Statute violates the Commerce Clause of Article I, Section 8, of the United States Constitution	5
1. None of the taxes here exacted from Interstate Carriers can be used in any respect for highway purposes—a fact considered immaterial by the State Court	8
2. The Legislature has departed from its consistent practice of allocating revenue from highway purpose taxes to highway funds	17
3. Additionally the Legislature has departed from its former method of measuring the tax in accordance with highway user	21
4. The tax was changed in its incidence and nature solely to meet a compelling need for general, non-highway purpose, revenue	23
5. The measure and application of the tax bears no relationship to the usage of Pennsylvania highways	28
6. The imposition of the tax upon gross receipts shows a purpose to charge for the privilege of doing business	35
B. The Statute violates the Equal Protection Clause of Article XIV, Section 1 of the United States Constitution	40
C. The Statute violates the Due Process Clause of Article XIV, Section 1, of the United States Constitution	43

TABLE OF CITATIONS

CASES:

Aero Mayflower Transit Co. v. Board of Railroad Com'rs., 332 U. S. 495 (1947) 13, 36, 38

Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U.S. 203 (1925) 7

Brown v. Maryland, 12 Wheaton 419 (1827) 6

Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) 22

Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948) 7, 38

Cheney Bros. Co., et al. v. Commonwealth of Massachusetts, 246 U.S. 147 (1918) 7

Clark v. Poor, 274 U.S. 554 (1926) 10

Commonwealth v. Columbia Gas and Electric Corporation, 336 Pa. 209 (1939) 37

Concordia Insurance Co. v. Illinois, 292 U.S. 535 (1933) 42

Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384 (1935) 7

Dawson v. Kentucky Distillers and Warehouse Co., 255 U.S. 288 (1921) 8

Dixie Ohio Express Co. v. State Revenue Commission, 306 U.S. 72 (1939) 13

Flint v. Stone Tracey Co., 220 U.S. 107 (1911) 8

Freeman v. Hewit, 329 U.S. 249 (1946) 7

Gast Realty & Investment Company v. Schneider Granite Company, 240 U.S. 55 (1916) 42

Hillsborough v. Cromwell, 326 U.S. 620 (1945) 42

Ingels v. Morf, 300 U.S. 290 (1937) 7, 20

Interstate Busses Corporation v. Blodgett, 276 U.S. 245 (1927) 7

Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931) 8, 11, 19, 29

Kane v. New Jersey, 242 U.S. 160 (1916) 7

Kansas City Southern Ry. Co. v. Road Improvement Dist., etc., 256 U.S. 658 (1921) 42

Lawrence v. State Tax Commission, 286 U.S. 276 (1932) 40
Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) 7
McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940) 8, 29, 33
Michigan-Wisconsin Pipe Line Co. v. Robert S. Calvert et al., 74 S. Ct. 396 (February 8, 1954) .. 6
Minnesota v. Blasius, 290 U.S. 1, 9 (1933) 7
Morf v. Bingaman, 298 U.S. 407 (1936) 11, 13
Norfolk and Western Railroad Co. v. Pennsylvania, 136 U.S. 114 (1890) 7
Ozark Pipe Line Corporation v. Monier, 266 U.S. 555 (1925) 7
Robbins v. Shelby County Taxing District, 120 U.S. 489, 497 (1887) 7
Safford v. Metropolitan Life Ins. Co., 119 Oh. St. 332, 164 N.E. 351, 352 (1928) 46
Shirks Motor Express Corporation vs. Messner, 375 Pa. 450, 463 (1954) 33, 34
Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) 7, 9
Sprout v. City of South Bend, 277 U.S. 163 (1927) 8, 22, 28
United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1919) 36
Welch v. Henry, 305 U.S. 134 (1938) 44, 45

STATUTES:

Act of December 27, 1951, P. L. 1761 .....17, 48
Act of May 21, 1937, P. L. 774, 36 PS Sections 652a, 652b, 652c, 652d, 652o, 6521 30
Act of May 16, 1940 (Extra Sess.) P. L. (1941) 949, 36 PS Sections 653-, 653c, 653e, 653n, 653q 30, 32
Act of June 11, 1941, P. L. 101, 36 PS Sections 654-, 654e, 654n, 654q 30, 31
Act of June 1, 1945, P. L. 1242, Section 1002, 36 PS Section 670-1002 .....15, 18
Act of June 22, 1931, P. L. 694, 72 PS Section 2183 ..17, 48

Act of May 21, 1931, P. L. 149, 72 PS Sections 2611a, 2611j 18
Act of July 2, 1947, P. L. 1199, 72 PS Sections 2613.1, 2613.10 18
Act of May 1, 1929, P. L. 905, Section 724, 75 PS Section 333 19
Act of August 21, 1953, P. L. 1270 26

CONSTITUTIONAL PROVISIONS:

Constitution of United States:
Article XIV, Section 1 .....40, 43
Article I, Section 8 48

AUTHORITIES:

11 American Law Report, Page 518 44
109 American Law Report, Page 523 44
112 American Law Report, Page 1449 45
118 American Law Report, Page 1153 44
124 American Law Report, Page 873 45
133 American Law Report, Page 987 45

I.
INTRODUCTION

This is an appeal from the Judgment of the Supreme Court of Pennsylvania. The Opinion of the Court and the Dissenting Opinion of Justice Bell are reported in the official State Advance Reports at 375 Pa. 450 and 463, respectively, the caption of the case being *Shirks Motor Express Corporation v. Messner.*[1] The decision was rendered on November 17, 1953; and reargument was refused on December 30, 1953. An appeal to the Supreme Court of the United States from this decision was allowed by the Chief Justice of the Supreme Court of Pennsylvania by Order dated January 30, 1954.

The jurisdiction of this Honorable Court is invoked on the ground that in this action Appellant sought a decree invalidating the Act of June 22, 1931, P.L. 694, as amended by the Act of December 27, 1951, P.L. 1761, of the Commonwealth of Pennsylvania, because it is repugnant to the Commerce Clause of Article I, Section 8, and the Due Process and Equal Protection Clauses of Article XIV, Section 1, of the United States Constitution, and the

[1] The instant case and the Shirks case were consolidated for the purpose of argument before the Pennsylvania Supreme Court and only one opinion and order was entered covering both appeals. Hence the caption of the opinion.

Supreme Court of Pennsylvania considered and decided these constitutional questions and held that the Act was not repugnant to the Constitution of the United States and sustained its validity.

The Appellees have filed a Statement Opposing Jurisdiction and a Motion to dismiss this appeal, on the ground that the case presents no substantial Federal question, or to affirm the decision, on the ground that the Federal questions are insubstantial. Hence this brief.

II.

STATEMENT OF THE CASE

Appellant, Interstate Motor Freight System, Inc., is a Michigan Corporation, having its principal office at Grand Rapids, Michigan. It is engaged in the business of transporting property by motor vehicle as a common carrier. It so engages solely in interstate transportation, doing so pursuant to certificates issued to it by the Interstate Commerce Commission. It operates over various routes and between various points in fifteen states, including Pennsylvania. It pays to Pennsylvania taxes for liquid fuels and registration fees on its vehicles.

Appellant's interstate routes traverse the highways of the Commonwealth of Pennsylvania and also the Pennsylvania Turnpike. During each of the years 1950 and 1951 the total number of miles operated in Pennsylvania was approximately 5,200,000 miles and in each of said years approximately 2,750,000 miles of said total was over the Turnpike. It paid tolls for these operations over the Pennsylvania Turnpike in the amount of $87,853.64 in 1950 and $91,194.12 in 1951.

Appellant brought a bill in equity against the Secretary of the Department of Revenue and the Auditor General of the Commonwealth of Pennsylvania, to enjoin them from enforcing the Act of June 22, 1931, P.L. 694, as last amended by the Act of De-

cember 27, 1951, P.L. 1761, which imposes a tax on the gross receipts of common carriers by motor vehicle, on the ground, inter alia, that it violates certain provisions of the United States Constitution. The defendants filed preliminary objections in the nature of a demurrer, to the effect that such Act, as amended, is not violative of such constitutional provisions. Accordingly all facts averred by Appellant are admitted.

The Court of Common Pleas of Dauphin County sustained the preliminary objections and dismissed the plaintiff's bill of complaint. The Supreme Court of Pennsylvania, on appeal, affirmed this decree, a dissenting opinion being filed by Justice Bell

The Appellant takes the position that this statute contravenes the United States Constitution in three respects, namely that it violates the Commerce Clause, the Due Process Clause and the Equal Protection Clause. These will be developed separately hereinafter, under appropriate headings, and the provisions of said statute and the facts which bear upon its validity will be brought out under the appropriate constitutional provisions involved.

III.

ARGUMENT

A. THE STATUTE VIOLATES THE COMMERCE CLAUSE OF ARTICLE I, SECTION 8, OF THE UNITED STATES CONSTITUTION

This is a case where a State actually has taxed interstate commerce, as such, by imposing a tax on the receipts from purely interstate transportation as a general revenue measure, but has done so under the guise of an excise for the use of its highways. The issue involved is of the utmost importance, for if Pennsylvania can so tax interstate commerce every other State in the Union can, and probably will, adopt a similar stratagem to evade the protection from crippling tax burdens which the Constitution guarantees that commerce.

The incidence of the instant tax, its measure, the application of the proceeds therefrom, its application, its very nature, the reason for its enactment, and the legislature's departure from established practice in allocating revenues from highway purpose taxes to highway uses, all affirmatively and firmly identify the tax for what it is—a general revenue measure. Yet, because the tax is labeled an excise on the use of the highways and employs an allocating formula based on mileage, it is blandly deemed by the State Court to be compensatory and the realities are ig-

nored. The crux of the matter is aptly expressed in the dissenting opinion by Mr. Justice Bell as follows:

> "Can a State tax interstate commerce by pretending that the tax is imposed as compensation for the use of its highways when not one cent of the tax (receipts) is used directly or indirectly for the highways—that is the basic question. Expressed in other words, when an act wears a false face shouldn't the Courts look underneath the masquerade to see whether the hands and body are really Esau's even though the voice is Jacob's?" (375 Pa., at 463)

Involved here is the basic question of whether the Commerce Clause is to remain a bulwark to insure the free flow of commerce between the states, or whether it is to be eroded by artifice, so that the states can bleed that commerce of its lifeblood to enrich their local coffers for purely local needs. If this decision is affirmed it will mark a departure from the fundamental principle established in the long line of cases, commencing with Chief Justice Marshall's pronouncement in *Brown vs. Maryland,* 12 Wheaton 419 (1827), that a State can no more tax interstate commerce than it can tax the operations of a federal instrumentality, and most recently reaffirmed in *Michigan-Wisconsin Pipe Line Co. vs. Robert S. Calvert, et al.,* 74 S. Ct. 396 (February 8, 1954); and will pave the way for a return to the "degraded state of commerce previous to the adoption of the constitution" (as noted by Marshall above at page 445). This the following analysis will readily demonstrate.

Argument

It is axiomatic that a State cannot tax interstate commerce, or lay a tax upon the business which constitutes such commerce, or impose a tax for the privilege of engaging in it. *Robbins vs. Shelby County Taxing District,* 120 U.S. 489, 497 (1887); *Leloup vs. Port of Mobile,* 127 U.S. 640, 648 (1888); *Norfolk and Western Railroad Co. vs. Pennsylvania,* 136 U.S. 114 (1890); *Cheney Bros. Co. vs. Commonwealth of Massachusetts,* 246 U.S. 147 (1918); *Ozark Pipe Line Corporation vs. Monier,* 266 U.S. 555, 562 (1925); *Alpha Portland Cement Co. vs. Commonwealth of Massachusetts,* 268 U.S. 203 (1925); *Minnesota vs. Blasius,* 290 U.S. 1, 9 (1933); *Cooney vs. Mountain States Tel. & Tel. Co.,* 294 U.S. 384 (1935); *Freeman vs. Hewit,* 329 U.S. 249 (1946); *Spector Motor Service, Inc. vs. O'Connor,* 340 U.S. 602 (1951); and the cases cited supra.

Of course this does not mean that a State cannot, for proper purposes, exact taxes which *incidentally* affect interstate commerce, or are payable out of the receipts from such commerce. Where the State actually confers benefits, at its expense, it may demand reasonable compensation therefor from those who enjoy the benefits. Thus, where the State furnishes, maintains, and polices highways, it may tax carriers who use them in their business to compensate it for these expenses, even though such a carrier is engaged in interstate commerce, *Kane vs. New Jersey,* 242 U.S. 160 (1916); *Interstate Busses Corporation vs. Blodgett,* 276 U.S. 245 (1927); provided the tax is not excessive for such purpose, *Ingels vs. Morf,* 300 U.S. 290 (1937); cf. *Central Greyhound*

Lines, Inc. vs. Mealey, 334 U.S. 653 (1948); and that it is, in fact, imposed for that purpose and not as a revenue measure, *Sprout vs. City of South Bend*, 277 U.S. 163 (1927); *Interstate Transit, Inc. vs. Lindsey*, 283 U.S. 183 (1931); and *McCarroll vs. Dixie Greyhound Lines*, 309 U.S. 176 (1940).

The Supreme Court of Pennsylvania fails to comprehend the basis for and the inherent limitations upon the levying of taxes of this type. It is urgent that this Honorable Court clarify the principle established in the long line of cases involving taxation of interstate carriers, so that the Pennsylvania Court and other State courts will not continue to confuse an issue that is so vital to the flow of commerce between the States.

---

1. None of the taxes here exacted from Interstate Carriers can be used in any respect for highway purposes—a fact considered immaterial by the State Court.

The Supreme Court of Pennsylvania pays lip service to the proposition that a State cannot tax interstate commerce, as such. It also concedes that the only basis on which the instant statute could be sustained under the Commerce Clause is that its purpose is to levy the tax as compensation for the use of the State's highways; and that:

> "Where an excise tax of such nature is imposed by a State upon carriers engaged in inter-

state commerce *it must affirmatively appear that it is levied only as compensation for the use of its highways.*" (375 Pa. at 456, emphasis supplied)

Wherein does this purpose thus affirmatively appear? The State Court refers to the title of the Act, which provides:

> "Imposing a tax on gross receipts as an excise on the use of the public highways . . .".

This title and the similar label in Section 2 of the Act are, of course, inconclusive in determining the real nature and purpose of the tax imposed. As was said in *Spector Motor Service vs. O'Connor,* 340 U.S. 602, 608 (1951): "It is not a matter of labels. The incidence of the tax provides the answer". See also *Flint vs. Stone Tracey Co.,* 220 U.S. 107, 145 (1911), saying:

> "The mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act."

So, too, it was said in *Dawson vs. Kentucky Distillers and Warehouse Co.,* 255 U.S. 288, 292 (1921):

> "*The name by which the tax is described in the statute is, of course, immaterial.* Its character must be determined by its incidence." (Emphasis supplied)

The State Court also states that the tax is apportioned so as to reflect the use of this State's high-

ways (by using the ratio of miles operated in Pennsylvania to all miles operated) and that this establishes that the purpose of the tax is compensation for the use of the highways and renders immaterial the use to which the tax receipts are allocated. The major premise is faulty, because inclusion of receipts from operations over the Pennsylvania Turnpike makes the apportionment to Pennsylvania greatly in excess of the use made of the highways furnished by that State (as is explained hereinafter). However, even if it were correct, the Court's conclusion that "the use to which the proceeds of the tax are allocated will not render it unconstitutional" (375 Pa., at 457) is wholly fallacious.

If this were true a State could levy a tax which is admittedly solely for the purpose of erecting new Capitol buildings, or paying unemployment compensation, and make interstate commerce pay for it, merely by the device of apportioning the tax in relation to highway usage. The Court cites four decisions of this Honorable Court to support its conclusion. They do not do so, however.

In *Clark vs. Poor,* 274 U.S. 554 (1926), this Court upheld an annual tax or fee imposed by Ohio upon common carriers as a condition precedent to operation; which was graduated according to the number and capacity of the vehicles employed. The opinion did state:

> "It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of

the Commission in the administration or enforcement of the Act, *and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount,* the use to which the proceeds are put is not a matter which concerns the plaintiffs." (At page 557, emphasis supplied)

The reference to "other purposes" was clarified in *Interstate Transit, Inc. vs. Lindsey,* 283 U.S. 183, 186 (1930), where Note 1 to the opinion explained that the Ohio statute:

> *"Declares that the taxes were laid, and were to be used only for, maintenance and repair of highways and for the regulation of motor traffic . . . The 'other purposes',* referred to in the opinion . . . *were the general expenses of the State Motor Vehicle Department* as distinguished from expenditures specifically upon the highways". (Emphasis supplied)

In view of this explanation this decision offers no solace to the Commonwealth, for all of the tax moneys *were* used for general highway purposes.

In *Morf vs. Bingaman,* 298 U.S. 407 (1936), this Court upheld a flat, modest fee per vehicle for "caravaning" cars across the State for sale. The opinion analyzed the facts, which it found amply supported a legislative declaration that the peculiar character of this traffic involved a use of the highways which enhanced wear and tear and augmented hazards to other traffic, and then stated:

"Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, *the cost of which the state pays in part from the proceeds of a general property tax. The use for highway maintenance of a fee collected from automobile owners may be of significance,* when the point is otherwise in doubt, *to show that the fee is in fact* laid for that purpose and is thus *a charge for the privilege of using the highways. Interstate Transit, Inc. v. Lindsey,* supra. But where the manner of levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." (At page 412, emphasis supplied.)

In connection with this latter observation, it is to be noted particularly that: the fee exacted was, on its face, modest; "the manner of its collection, not unlike that of a toll for the privilege of entering and using the highways, definitely identifies it as a charge" for the use of the highways (at p. 410); and the *State did pay a part of its highway costs from the proceeds of a property tax.*

Tax moneys exacted from non-highway users were spent for highway purposes. It was reasonable, therefore, to use some of the taxes collected from the highway users for general governmental purposes, for the benefit of the non-highway users. If the revenue raised from various Pennsylvania taxes which

are allocated to the General Fund, were appropriated in some degree for highway expenses then *Morf vs. Bingaman* might be analogous. Such, however, is not the case and there is no analogy.

The opinion in *Dixie-Ohio Express Co. vs. State Revenue Commission,* 306 U.S. 72 (1939), also contains language to the effect that the tax was not offensive merely because part of the proceeds were used for purposes other than construction or maintenance of the state highways. There, too, the tax was an annual fee on each vehicle for operation over the roads of the State; the tax being graduated according to capacity and weight. *The fees were allocated to the rural postal road division of the Highway Department.* Since *all of the tax proceeds did go to the Highway Department,* it was immaterial as to how the State allocated the various taxes charged as compensation for the use of the highways, with respect to different highways or different types of over-all highway costs.

In *Aero Mayflower Transit Co. vs. Board of Railroad Com'rs.,* 332 U.S. 495 (1947), the statute imposed a flat tax of $10.00 annually upon each vehicle and a fee of ½ of 1% of the carrier's revenue, with an annual minimum of $15.00 per vehicle. The State had not demanded nor attempted to collect this tax on revenue, but collected only the $15.00 per vehicle fee. Accordingly, the Court in defining the issues stated:

> "Since Montana has not demanded or sought to enforce payment by appellant of more than the

flat $15.00 minimum fee . . . we limit our consideration of the so-called 'gross revenue' tax to that fee . . .

"With the issues thus narrowed, *we have,* in effect, *two flat taxes,* one for $10.00, the other for $15.00, payable annually on each vehicle operated on Montana highways." (At pages 500-501, emphasis supplied)

The opinion then pointed out that the taxes, on their face, were exacted "in consideration of the use of the highways" and that "the aggregate amount of the two taxes taken together is less than the amount of similar taxes" heretofore sustained (page 503).

The opinion continues:

"This does not mean, as appellant seems to assume, that the proceeds of all taxes levied for the privilege of using the highways must be allocated directly and exclusively to maintain them. Clark vs. Poor, supra; Morf vs. Bingaman, supra. That is true, although this court has held invalid, as forbidden by the Commerce Clause, certain state taxes on interstate motor carriers because laid 'not as compensation for the use of the highways but for the privilege of doing the interstate bus business'. Interstate Transit vs. Lindsey . . ." (At page 504)

The opinion further developed the proposition that whether the tax revenue is used for highway maintenance is of significance in showing whether the fee is in fact laid for the purpose of highway usage,

and distinguished between a flat license fee, which makes the grant of the privilege of using the highways conditional upon payment of the fee, on the one hand, and a gross revenue fee, on the other hand, which is conditioned on the receipt of such revenue from operations. It concluded that the former of itself shows a purpose to charge for the use of the highways and has none of the *"vices characteristic of gross income taxes heretofore held to vitiate such taxes laid by the states on interstate commerce."* (Page 506).

While it appeared that moneys in the Montana Motor Carrier Fund were subject to appropriation for use in activities other than those connected with the public highways (Footnote 3 to the opinion), it did not appear that moneys in the State's General Fund were not used for highway purposes.

None of these cases support the State Court's broad conclusion and none is analogous to the situation in Pennsylvania. Pursuant to the amendment of 1951 to Section 9 of the instant gross receipts tax, the taxes collected from interstate carriers go into the General Fund. No statute appropriates any part of the General Fund for highway purposes. The State Highway Law, enacted June 1, 1945, P.L. 1242, Section 1002, 36 P.S. Section 670-1002, provides that "all expenditures" authorized to be made thereunder shall be paid out of the Motor License Fund as appropriated.

Thus, not one penny of the taxes herein exacted from interstate carriers can be used directly, indi-

rectly, or in practical operation and effect, for highway purposes or for the expenses of the Highway Department. Neither can one penny of the tax moneys collected from non-highway users be used for highway purposes. How could such a tax possibly be sustained as one for the purpose of compensating the State for the use of its highways?

The opinion of the State Court advances the proposition that "*If* the tax is otherwise constitutional" the disposition of the receipts is immaterial (375 Pa., at 457). This, of course, begs the question. The question is whether the tax is actually levied for the purpose of compensating this State for the use of its highways. In arriving at that purpose one of the most important factors is the disposition of the tax moneys; and this factor becomes particularly controlling where, as here, the legislature has departed from its established practice of allocating revenue from highway purpose taxes to highway funds and has allocated them to the General Fund. This the State Court ignores. It also ignores the other features of the Act and the circumstances motivating its enactment, which clearly show that its purpose was not to compensate the State for highway use. These now will be analyzed.

2. The Legislature has departed from its consistent practice of allocating revenue from highway purpose taxes to highway funds.

The Act of June 22, 1931, P.L. 694, 72 P.S. Section 2183, imposed a tax on the gross receipts of companies engaged in carrying passengers or property for hire over the highways of this Commonwealth in motor vehicles. It made a distinction between those operating interstate and intrastate by providing, in Section 9 thereof, that taxes collected from companies operating interstate should be credited to the Motor License Fund, while taxes collected from intrastate operators should be credited to the General Fund.

This provision showed that the Legislature realized that it could tax interstate carriers solely for the purpose of compensating the Commonwealth for providing highways—hence the provision for paying such revenue into the Motor License Fund, from which expenditures are confined to highway purposes. On the other hand, it realized that it could tax a company operating intrastate for the privilege of engaging in such business—hence the provision for using such taxes for general revenue purposes. By this express allocation it did "appear affirmatively" that the tax was levied as compensation for the use of the highways.

Section 9 was amended by the Act of December 27, 1951, P.L. 1761, so as to provide that *all* taxes collected under the Act shall be credited to the Gen-

eral Fund[2]. Now the taxes imposed upon interstate carriers are used not for highway purposes, but for purposes wholly foreign thereto. No statute appropriates any part of the General Fund for highway use. The State Highway Law, Act of June 1, 1945, P.L. 1242, Section 1002, 36 P.S. Section 670-1002, provides that "all expenditures" authorized to be made thereunder shall be paid out of the Motor License Fund as appropriated.

Now the interstate carrier must pay a portion of the cost of services and bounties furnished to citizens of Pennsylvania, but not furnished to it, and from which it will not, and is not expected to, receive any benefit. A clearer expression of legislative intention to impose a general revenue tax is inconceivable. Further, this obvious intention is strengthened by the fact that it represents a diametrical departure from prior legislative practice.

The Pennsylvania Legislature has long and consistenly adhered to the practice that where it levies taxes for the purpose of compensating the State for the maintenance and policing of its highways, it expressly provides for the allocation of the proceeds therefrom to the Liquid Fuels Tax Fund or the Motor License Fund, which funds are expendable only for highway purposes. This is true of the liquid fuels taxes (imposed by the Act of May 21, 1931, P.L. 149, 72 P.S., Sections 2611a, 2611j, and the Act of July 2,

---

[2] The exact wording of the original and amendatory Acts is set forth in paragraph 2 of the Jurisdictional Statement.

1947, P.L. 1199, 72 P.S., Sections 2613.1, 2613.10), of the motor vehicle registration fees and operator's license fees and other fees imposed by the Vehicle Code (Act of May 1, 1929, P.L. 905; Section 724, 75 P.S., Section 333) and, of course, of the gross receipts tax on interstate carriers up until now.

The effect of such a departure was determined in *Interstate Transit, Inc. vs. Lindsey,* 283 U.S. 183 (1931). There this Court invalidated a statute imposing upon interstate bus operators a graduated tax according to carrying capacity because it found that the tax was not levied as compensation for the use of the highways. One reason for so concluding, which is exactly in point here, is found in the following language from the Opinion:

> "In the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining state highways and regulating motor traffic, *it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the highway fund* * * * In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one mill road tax, and authorizing the issue of bonds for the construction of highways and bridges—the Legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the commission exclusively for

the construction or maintenance of highways or bridges. *The absence in Section 4 of this provision,* which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways, or the regulation of motor vehicle traffic, *is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business.*" (283 U.S., at 188-189, emphasis supplied)

See also *Ingels vs. Morf,* 300 U.S. 290, 295 (1937), wherein this Court said:

"Here appellant does not show that the fees collected are used to meet the cost of the construction or maintenance of its highways. Section 6 of the challenged act, which directs that permit fees be paid into the general fund of the state treasury, is to be contrasted with other California statutes relating to motor vehicles, which exact license fees and taxes and direct that they be paid, at least in part into special funds devoted for highway purposes * * * Appellants point to no statute appropriating any part of the general fund of the state treasury for highway purposes."

This present disposition of the tax receipts, as contrasted with the other vehicular taxes and prior legislative practice in Pennsylvania should, without more, stamp this tax as a general revenue measure. But this is not all!

3. Additionally the Legislature has departed from its former method of measuring the tax in accordance with highway user.

In addition to departing from the practice of using taxes levied on interstate transportation solely for highway purposes the amendatory Act of 1951 has made changes in the measure of the tax which render it unrelated to compensation for highway use.

Section 3 of the Act of 1931 provided that payments made by a carrier for vehicle registration fees should be credited against the Gross Receipts Tax. By this the Legislature gave recognition to the fact that, when added to the payment of gasoline taxes (which bear a fair relation to highway user), the payment of license fees fairly compensates the State for normal highway use. However, a carrier who does not pay license fees, but uses the State's highways should pay for such use, as reflected by its receipts therefrom; while a carrier who does pay license fees, but who constantly uses the highways, should pay extra for that excessive use, again as reflected by its receipts therefrom.

This credit demonstrated an intention to impose a reasonably compensatory tax and to treat fairly interstate carriers, who, in the normal course of events, do not make as much use of the State's highways as intrastate carriers do. This is illustrated by the fact that the revenues from the Gross Receipts Tax on interstate carriers averaged only about $25,000 per

biennium (Bill of Complaint, paragraph 14). And see *Sprout vs. City of South Bend,* 277 U.S. 163, 170 (1927); and Justice Frankfurter's dissenting opinion in *Capitol Greyhound Lines vs. Brice,* 339 U.S. 542 557-558 (1950).

The Amendatory Act of 1951 eliminated these credits for vehicle registration fees. By this change the Legislature clearly showed that it no longer was interested in having interstate carriers pay only their fair share of the costs of highway construction, maintenance, and policing. Now such carriers must pay a tax of eight mills on their gross receipts regardless of the fact that they have paid registration fees in excess of that amount.

It is thus apparent that now the Commonwealth is interested solely in obtaining general revenue, not constitutional compensation for the use of its highways.

Section 3 of the Act of 1931 also provided that if a carrier paid an excise tax to any city of the Commonwealth for the use of its highways it should receive a credit therefore against the Gross Receipts Tax. Here the Legislature recognized that where a carrier is being taxed for its use of the highways it should not be taxed twice for the same use; that it is entitled to fair compensation, but not double compensation.

The amendatory Act of 1951 also eliminated this credit. Here too it is apparent that now the Commonwealth is after revenue as such, not reasonable compensation for the use of its highways.

The instant Gross Receipts Tax, no longer being tied in with registration fees and highway use taxes, now is conditioned solely upon revenue collected in the conduct of interstate commerce. Thus it is that business—the privilege of engaging in interstate commerce—that is being taxed.

These changes in the measure of the tax should, of themselves, stamp the tax as one on interstate commerce, as such. But this is not all!

---

4. The tax was changed in its incidence and nature solely to meet a compelling need for general, non-highway purpose, revenue.

The revenues from the liquid fuels taxes and gross receipts taxes on interstate carriers, from motor vehicle registration and license fees, from miscellaneous highways revenues, and from Federal highway aid, during the 1945-1947, 1947-1949, and 1949-1951 bienniums, were more than sufficient to meet all appropriations and all expenditures thereunder for and by the Department of Highways for the construction and reconstruction, resurfacing and maintenance of highways and bridges, administrative expenses, plant and equipment acquisition and maintenance, and other special and miscellaneous work; and for expenditures by other departments of the Commonwealth having relation to the construction, maintenance, and planning of highways and bridges, and the policing of the highways, including highway

safety education. The cash balance in the Motor License Fund as at June 1, 1951 amounted to $48,051,540.00.

The revenues that will come from these same sources during the 1951-1953 biennium will exceed by several million dollars all appropriations passed by the General Assembly during the 1951 session for all of the above purposes during that biennium; so that the cash balance in the Motor License Fund will increase by at least ten million dollars during the biennium, assuming that all moneys appropriated are expended.

The taxes paid by interstate carriers pursuant to the Gross Receipts Act of 1931 averaged approximately $25,000 per biennium. The revenue from this tax, as amended by the Act of 1951, will amount to approximately $19,000,000 for the 1951-1953 biennium; and the greater part of this sum will arise from the tax levied on gross receipts from interstate operations.

The above facts, which are admitted in this proceedings[3] (as they would have to be, in any event) were disregarded by the State Court.

Why did the Legislature increase the taxes of interstate carriers by millions of dollars? Obviously it was not for the purpose of having these carriers compensate the State for Furnishing and policing the

---

[3] These facts were averred in the Bill of Complaint (paragraphs 14, 15, and 16), and admitted by the preliminary objections in the nature of a demurrer.

highways which they use. The taxes already imposed on such carriers, as exacted for the past twenty years, had been more than sufficient to meet all such expenses and had enabled the State to build up a substantial surplus for these purposes. Such taxes, excluding the gross receipts tax, will produce more revenue than the State plans to spend for such purposes in the 1951-1953 biennium. *The answer to our query lies in the Commonwealth's crying need for revenue to spend for purposes wholly unrelated to our highways.*

The Commonwealth of Pennsylvania, in adopting a General Fund budget for the 1951-1953 biennium and in providing enough revenue to meet such budget, was first faced with the necessity of meeting approximately $112,000,000 of obligations previously incurred by legislative action, for which no means of payment had been devised. This included approximately $60,000,000 for bonuses to ex-servicemen, $42,000,000 for school subsidies and retirement payments, and $10,000,000 for additional State Authority rentals. Also to be met were certain new expenses and increases in normal expenses, such as appropriations for civil defense, increased appropriations for schools, public assistance, health, and welfare, and other projects and public works.

The Governor recommended that this additional revenue be raised by means of a flat income tax, but this met with opposition and did not become law. A general sales tax was given some consideration as an alternative, and bills embodying various other alternatives to the income tax were considered. Finally,

in the closing hours of the 1951 session, a "package" of revenue measures was enacted, which exactions together were designed to produce the necessary additional revenue. Included in this tax package was the amendatory act of 1951 to the Gross Receipts Tax Act of 1931.[4]

With this background and under these circumstances there can be no question as to what the legislative purpose was in changing the Act of 1931. Its purpose was to impose a general revenue excise tax on interstate commerce. The legislative steps are so patent that no other conclusion is possible.[5]

The Commonwealth's effort to overcome this conclusion is to argue that the construction and maintenance of highways could cause practically unlimited

---

[4] These facts were averred in the complaint (paragraphs 17-19) and admitted by the preliminary objections. In fact the Commonwealth's crying need for general revenue and the passage of this package of tax measures to meet that need, in lieu of unpopular income or sales taxes, were facts so generally known that it would have been proper for the Court to take judicial notice thereof. Yet the State Court ignored these facts completely. *Surely when the question is whether the Legislature has transcended constitutional rights by imposing taxes for an improper purpose, such background facts, which so clearly show the real purpose of the tax, cannot be ignored.*

[5] It is highly significant that in the 1953 session of the General Assembly a sales tax was enacted; and thereafter the Gross Receipts Tax was re-amended to make the taxes collected from interstate carriers payable into the Motor License Fund and to restore the credits removed by the 1951 amendment. Act of August 21, 1953, P.L. 1270.

expenditures of money, and that the equipment of motor carriers contributes heavily to the cost of construction and maintenance of the highways and has an important bearing on the question of the reasonableness of the tax. This begs the question at issue—namely, was that the purpose of exacting this tax? The State could spend more money on its highways, but it does not intend to do so. Not one penny of this tax revenue will or can be used for highway purposes. All of it is to be spent, beyond recall, for wholly unrelated purposes.

Thus we inevitably conclude that the Act of 1951 converted the Gross Receipts Tax into a general revenue measure. By it the interstate carrier, by carrying on such commerce, is compelled to pay huge sums for the sole benefit of Pennsylvania citizens.

By this Act the State is no longer compelling interstate carriers "to pay their way", which it has the right to do. They have more than been doing this under the existing levies. This Act compels them to pay their way and also to pay the way of others who have no right to call upon them for such payment.

This legislative evolution of the amendatory Act of 1951 should, of itself, stamp this tax as a general revenue measure. But this is not all!

5. The measure and application of the tax bears no relationship to the usage of Pennsylvania's highways.

Since a tax may be levied upon interstate carriers solely for the purpose of compensating the state for furnishing and policing the highways, which such carriers use, the nature and measure of the levy must bear a reasonable relationship to the actual facilities provided and the actual use made of those highway facilities. In the absence of such relationship the tax is automatically stamped as being one for an improper purpose. This principle is illustrated by several decisions by this Honorable Court.

In *Sprout vs. City of South Bend*, 277 U. S. 163 (1927), this Court had before it a municipal ordinance which imposed license fees upon the operation of buses for hire on the city streets, which fees were fixed according to the seating capacity of the bus. The Court held this to be violative of the Commerce Clause. It conceded that the State could impose a charge on vehicles as their contribution to the cost of maintaining highways, but observed:

> *"But no part of the license fee here in question may be assumed to have been subscribed for that purpose. A flat tax, substantial in amount, and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a mea-*

sure of the cost or value of the use of the highways". (277 U. S. at 170, emphasis supplied)

In *Interstate Transit, Inc. vs. Lindsey,* 283 U. S. 183 (1931), where this Court invalidated a statute imposing a yearly tax on interstate motor buses graduated according to carrying capacity, the opinion concluded:

> *"Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state."* (283 U. S., at 190, emphasis supplied)

In *McCarroll v. Dixie Greyhound Lines,* 309 U. S. 176 (1940), an interstate bus operator attacked an Arkansas statute, which prohibited entry into the state of any vehicle carrying over 20 gallons of gasoline in its tank, until a tax thereon of 6½ cents per gallon was paid. The tax moneys were allocated to highway purposes; and the State Supreme Court held that the tax was imposed on the privilege of using the highways. The Circuit Court of Appeals held the tax to be invalid and observed that:

> "If it is to be sustained * * * it must be sustained upon the theory that the method employed for determining the amount of the tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the state * * * We are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an

interstate carrier for use upon the highways of another state". (As quoted in 309 U. S., at 179).

This decision was affirmed on appeal. The concurring opinion of Mr. Justice Stone elaborated on the proposition that the tax could not be taken as a fair measure of the company's use of the highways.

Turning to the instant tax we find that the gross receipts allocating formula allocates to Pennsylvania all travel within the State, regardless of whether such traverses highways built, maintained, and policed by the Commonwealth or its political subdivisions. Specifically, mileage traversing the Pennsylvania Turnpike is included in the Pennsylvania portion of the ratio. Accordingly, *the gross receipts arising from interstate commerce across the Pennsylvania Turnpike—by law not a part of the system of State Highways—are taxed.*

The Pennsylvania Turnpike is owned by, was constructed by, and is operated and maintained solely by the Pennsylvania Turnpike Commission. This Commission was created by, and the original Turnpike and the Eastern and Western extensions thereof were constructed and are operated pursuant to, the provisions of the Act of May 21, 1937, P. L. 774, 36 PS., Section 652a; the Act of May 16, 1940 (Extra Sess.), P. L. (1941) 949, 36 PS., Section 653; and the Act of June 11, 1941, P. L. 101, 36 PS, Section 654.

Each of these Acts expressly provides that the costs of acquisition, construction, maintenance, operation, policing, and administration of the Turnpike

shall be met *solely* by proceeds derived from the issuance of bonds and from the collection of tolls by the Turnpike Commission, 36 PS, Sections 652d, 6521. Any obligations or expenses incurred by the Department of Highways in connection with construction or maintenance must be reimbursed to it by the Commission, out of bond proceeds and tolls, respectively. 36 PS, Sections 652c, 6521, 653e and 654e. The bonds are to be paid off or redeemed and the interest thereon paid solely from the revenue from tolls; and the bonds do not pledge the credit of the Commonwealth, *nor is it obligated "to levy or pledge any form of taxation therefore, or to make any appropriation for their payment"*. 36 PS, Section 652b; and no debt of the Commonwealth's shall be incurred in the exercise of any of the powers granted by the Act.

The Turnpike Commission acquired, by grant, purchase, or condemnation, land constituting the right-of-way upon which it erected the highway; and this Commission, not the Commonwealth, is the owner of the right-of-way and the highway erected thereon. This highway, owned and operated by the Commission, is a revenue-producing and self-liquidating project, which entails no expenses and no obligations whatever upon the Commonwealth of Pennsylvania. *Only when all bonds and interest thereon shall have been paid can the Turnpike "become a part of the system of State highways"*. 36 PS, Sections 652o, 653q, 654q.

When this appellant, or any other interstate carrier, operate over the Pennsylvania Turnpike it must pay a toll therefor. This toll must be fixed at

an amount which will cover all costs of maintenance, policing, and administration and meet the debt service requirements of the bonds issued for construction funds. 36 PS, Sections 652l, 653n, and 654n. It is common knowledge that the Turnpike revenues have been exceeding expectation and are more than adequate to meet these expenses. *Interstate commerce, therefore, while using the Turnpike, already more than pays its way.*

The instant Act, however, makes an interstate carrier pay an amount in excess of this, by taxing its gross receipts from such Turnpike transportation. This amount, over and above what is needed to pay the carrier's way on the Turnpike, is taken by the State in return for nothing that it gives, for the Commonwealth spends not one cent for the construction, maintenance, operation, and policing of the Turnpike, nor can it incur any obligation with respect thereto.

How can it be found that the purpose of this tax is to compensate the State for furnishing and policing highways for interstate carriers when the State demands compensation for transportation over highways which it does not own nor maintain? *Pennsylvania no more needs compensation for transportation over the Turnpike than the State of Maine would, because that highway does not cost it, nor Maine, one penny.* It is not even a part of the system of Pennsylvania highways.

This imposition of the tax upon Turnpike receipts is a patent manifestation that the Common-

wealth is after revenue, not compensation— that it is taxing the privilege of engaging in interstate commerce, not merely making a fair charge for highways which it furnishes.

With respect to the fact that Turnpike receipts are taxed, the Court below advances the proposition that, "If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice cannot provide the foundation for a constitutional argument." 375 Pa., at 461. Assuming that the choice is optional,[6] it is no answer to the charge that the tax is imposed for an improper purpose. The case of *McCarroll vs. Dixie Greyhound Lines,* 309 U. S. 176 (1940), heretofore discussed, gave a ready answer to such a proposition.

There the tax upon the amount of gasoline in the vehicle upon entering the State was invalidated because such could not measure the use of the highways. The State had argued that the carrier, by altering the amount of gasoline brought into the State, could so moderate the tax that it would bear a fair relation to highway user. In answer to this Justice Stone observed that the State is without power to regulate the amount of gasoline carried interstate and said that:

---

[6] That such is entirely optional is a doubtful proposition. Interstate common carriers may operate only pursuant to permission granted by the Interstate Commerce Commission. A carrier may prefer State highway routes over Turnpike routes, or vice versa, but the Commission, not the carrier, will determine which, if any, of those routes the carrier may employ.

> *"The state must tax the commerce as it is done, and not as it might be done if the state could control it"*. (309 U. S. at 183, emphasis supplied)

The opinion below and the Appellees also extol the advantages of travel over the Turnpike. So let it be, but this is immaterial. The Court overlooks the fact that the carrier in employing the Turnpike, perhaps with no option to do otherwise, pays fully in tolls for all advantages that it has to offer. What the appellant objects to is that, in addition to such full payment in tolls, it must pay an additional tax on interstate receipts to the Commonwealth for a highway which Pennsylvania does not furnish.

The opinion below also states that the "Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth." 375 Pa., at 461 and the Appellees make much of this proposition. The fact remains that the State may only charge interstate carriers an amount that will fairly compensate it for its costs in furnishing, administering, and policing highways; and here no such costs exist. All such costs can be met solely from the collection of tolls and not from the State's funds. How can the State justify taxing users of the Turnpike for the purpose of compensating it for such use when the State is under no obligation to and has no right to levy any form of taxation, or to make any appropriations, for payment of the construction costs or expenses of the Commission?

The Court below and the Appellees also say that appellant has failed to prove that the toll plus the

tax exceeds a fair compensation for use of the Turnpike. Appellant need prove no such thing (although the admitted fact that the tolls do cover debt service and all expenses of the Commission does prove it). On the contrary the burden is on the Commonwealth to establish that it affirmatively appears that this tax is levied solely for the purpose of compensating it for the use of its highways. How can it do this when the tax is levied for use of the Turnpike, which cannot cost it one cent?

If and when the Turnpike does become a part of the State highway system, because the users have fully paid for it in tolls, and the State has to maintain it, then it thereafter may be entitled to reimbursement by these carriers. Until such time a tax levied upon such Turnpike operations cannot be justified as one for the purpose of compensating the State for furnishing highways.

This feature of the tax should, alone, stamp it as a general revenue measure. But this is not all!

---

6. The imposition of the tax upon gross receipts shows a purpose to charge for the privilege of doing business.

Where a flat tax or license fee per vehicle is imposed as a condition precedent to the use of the highways, such, not unlike a toll, of itself is indicative that the exaction is made for the use of the highways. However, where a tax is conditioned on the receipt of

revenue during the year in the conduct of a business, such of itself is indicative of a purpose to charge for the privilege of engaging in that business.

This was recognized in the *Aero Mayflower Transit Case,* supra, where this Court upheld a so-called gross revenue tax, because the State in fact was not enforcing it as such, but only collecting the minimum fee per vehicle thereunder. There the opinion made the above distinction between a flat vehicular fee and a gross revenue tax and employed the following language:

> "*The* minimum so called '*gross revenue' fee,* on the other hand, *is technically conditioned on the receipt of such revenue from the operations within Montana. But the flat minimum of* $15 annually, which is all we have before us * * * *has none of the alleged vices characteristic of gross income taxes heretofore held to vitiate such taxes laid by the states on interstate commerce.*" (332 U. S., at 505-506, emphasis supplied)

See also *United States Glue Co. vs. Town of Oak Creek,* 247 U. S. 321 (1919), where this Court, in sustaining a net income tax upon a domestic corporation, although the computation included income derived from transactions in interstate commerce, made a distinction between a net income tax, which merely indirectly affects interstate commerce, and a gross receipts tax, which is a direct and immediate burden upon such commerce. It observed that:

> "*A state tax* upon the business of selling goods in foreign commerce, *measured by a cer-*

tain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce." (247 U. S. at 328, emphasis supplied)

In fact the Supreme Court of Pennsylvania has recognized that the levying of a tax on or measured by gross receipts is indicative of a purpose to tax the privilege of doing business, in the case of *Commonwealth vs. Columbia Gas and Electric Corporation,* 336 Pa. 209 (1939). One of the factors employed in determining the apportionment of the tax there involved was that of gross receipts from business in Pennsylvania over total gross receipts. As to this factor the opinion states:

"*Gross receipts necessarily indicate business done;* they are derived from the use of intangibles as well as tangible assets. *They are indicative of a going concern value, which is inherent in the privilege of doing business in the Commonwealth.*" (At page 219, emphasis supplied)

Appellees, in their Statement Opposing Jurisdiction, attempt to support this gross receipts tax on carriers by stating that: "Pennsylvania has imposed taxes ranging from 8 to 28 mills per annum upon the gross receipts of railroads apportioned according to mileage in Pennsylvania. See Lehigh Valley Railroad Co. v. Commonwealth, 145 U. S. 192." This is a grossly misleading statement. The case cited expressly recognized that *that tax was and only could be levied on the receipts from intrastate commerce,* and held that continuous transportation between two points in the

State was not rendered interstate by mere passage over the soil of another State enroute, and hence was taxable.

Appellant does not insist that a gross receipts tax could not be imposed upon interstate carriers, provided the tax was levied for the proper purpose of compensating the state for the use of its highways, and was not excessive or discriminatory.[7] It does make the point that the very fact that the tax is levied on gross receipts from interstate commerce is strong indication that the purpose thereof is to tax the privilege of engaging in that commerce. That indication might be overcome by other features of the particular taxing statute, but such is not the case here, for, as has been seen, every other feature of the instant tax points to that same illegal purpose.

[redacted]

The improper purpose and consequent unconstitutionality of this present tax is demonstrated incontrovertibly by the allocation of the proceeds to wholly non-highway uses, by the removal of the original credits which avoided double and excessive highway

---

[7] A gross receipts tax on interstate motor carriers has never been sustained by this Court. However, there is dictum in *Central Greyhound Lines, Inc. vs. Mealey,* 334 U.S. 653 (1948), that such a tax could be sustained constitutionally, if otherwise proper and if properly apportioned as to mileage within the State. No departure was indicated from the *Aero Mayflower Transit Case,* supra, decided during the same term of Court, that a gross receipts tax of itself is indicative of a purpose to tax the privilege of engaging in interstate commerce.

use charges; by the need for general revenue which alone prompted its enactment; by the lack of relationship between the levy and the actual highway usage—in taxing Turnpike receipts; and by the imposition of the tax on yearly gross receipts.

Each of these factors is, alone, strongly indicative of a purpose to tax the privilege of engaging in interstate commerce and to impose a general revenue tax on that commerce. Their cumulation in one statute establishes such unconstitutional purpose indisputably.[8]

---

[8] The original Act of 1931 had several features which showed affirmatively that the tax was levied on interstate carriers only as compensation for their use of the State's highways; principally that the tax receipts could be expended solely for highway purposes and credits were given for registration fees and excise taxes to avoid excessive or double compensation for such use. These features no doubt outweighed other elements of the Act which pointed to a contrary purpose—the levy upon annual, gross receipts and upon Turnpike mileage (which arose years after the original enactment and reached significant proportion only in recent years). However, the amendments of 1951 removed these favorable factors, so that now every significant feature points to but one purpose—to illegally tax interstate commerce, as such. Further, this change was wrought solely to meet a crying need for general revenue. Thus did all semblance to a compensatory tax disappear. Thus is the amendatory Act of 1951 unconstitutional.

B. THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF ARTICLE XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION

If it should be found that this tax on gross receipts is levied as compensation for the use of the highways it still is invalid because it is discriminatory.

Section 1 of Article XIV of the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". This clause is applicable to state tax legislation. *Lawrence vs. State Tax Commission,* 286 U. S. 276 (1932).

It is the plaintiff's position that the instant Act effects inequality of tax burdens and discriminates among taxpayers by taxing Turnpike receipts.

It previously has been explained, in Part A, 5, of the Argument, that gross receipts arising from interstate commerce across the Pennsylvania Turnpike are taxed; and that the Commonwealth does not own, furnish, police, or maintain the Turnpike, nor incur any expenses or obligations with respect to it. It is not a State highway for use of which it needs or is entitled to any compensation.

The inclusion of Turnpike mileage causes a carrier who uses the Turnpike (and pays well to do so) to pay more for what the State does give him (the use of State highways) than another carrier having

the same total Pennsylvania mileage, but having less Turnpike mileage, or none at all.

For example, if two carriers each have total gross receipts of $1,000,000 and 50% of their total yearly mileage of 2,500,000 miles is in Pennsylvania, each will pay a tax of eight mills on $500,000, or $4,000 for the use of Pennsylvania highways. If one of these does not travel over the Turnpike at all, while the other travels 1,000,000 miles over the Turnpike, the former will pay $4,000 to travel 1,250,000 miles over highways furnished by the Commonwealth, while the latter will pay the same $4,000 to travel only 250,000 miles over such highways. The latter will pay 1.6 cents per mile, and the other only .32 cents per mile for the same benefits, or over five times as much.

If the Commonwealth does levy this tax as compensation for using *its* highways, it charges different carriers different amounts for the same usage, or amounts wholly unrelated to differences in such usage. Thus is there lack of uniformity in its operation on the persons affected as payers. Thus does the State take money from one individual (Turnpike users) and use it for another's benefit (non-Turnpike users).

Here some taxpayers (Turnpike users) are assessed an extra tax (on Turnpike receipts) for the same use of highways furnished by the Commonwealth that other taxpayers (non-Turnpike users) enjoy without paying such tax. Here the proceeds are used to benefit taxpayers disproportionately to the levy upon them. Any uniformity apparent on the face of

the tax evaporates when the ultimate dollar burden for the use of the State's highways is examined.

Appellant's position is that equal protection has been denied it because it pays a disproportionately higher tax for the same benefits (i.e., use of Pennsylvania highways), simply because it uses the Turnpike, that are conferred upon a carrier which does not use the Turnpike, or uses it less. This Honorable Court has proscribed such a levy and invalidated a tax to pay for the paving of streets, where the burden was disproportionate to the benefit, saying in *Gast Realty & Investment Company vs. Schneider Granite Company,* 240 U. S. 55, 57 (1916):

> "But as is implied by Houck v. Little River Drainage Dist., if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the *probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact".* (Emphasis supplied)

See also *Kansas City Southern Ry. Co. vs. Road Improvement Dist., etc.,* 256 U. S. 658 (1921); *Hillsborough vs. Cromwell,* 326 U. S. 620, 623 (1945); and *Concordia Insurance Co. vs. Illinois,* 292 U. S. 535, 542 (1933).

In summation, it is clear that to include Turnpike mileage in the allocation formula is to increase the tax burden of a carrier, such as this appellant, beyond that of similarly situated carriers not using the Turn-

pike, and disproportionately to the benefits received from the use of highway facilities furnished by the Commonwealth. This is a denial of the equal protection under the law that is guaranteed by the Federal Constitution.

C. THE STATUTE VIOLATES THE DUE PROCESS CLAUSE OF ARTICLE XIV, SECTION 1, OF THE UNITED STATES CONSTITUTION

The amendatory Act of 1951 which so radically changed and substantially increased the gross receipts tax imposed by the Act of 1931, was not enacted by the General Assembly until December 15, 1951, and did not become law until December 27, 1951. Yet it provides that the tax imposed thereunder shall be due and payable upon gross receipts for the entire calendar year of 1951.

Thus a substantial and burdensome tax increase, and to all intents and purposes a new tax—the nature and amount of which could not have been anticipated by appellant while it was voluntarily transporting property at remunerative rates throughout the year—is imposed upon its receipts for the whole year.

Appellant is aware that the power to tax is a broad power, but it cannot believe that it can be employed to deprive it of its freedom of choice and of its property and to violate basic concepts of fair play, as this retroactive imposition does.

It is true that numerous cases have held that a State may enact or increase an existing income tax during a legislative session and make that tax retroactive to the beginning of the year. The cases are collected in annotations in 11 A.L.R. 518, 109 A.L.R. 523, and 118 A.L.R. 1153. This rule, although it has been subjected to some criticism (see the dissenting opinion in *Welch vs. Henry,* 305 U. S. 134, 157 (1938)), does have an understandable basis.

Where a person has made a profit in his business and subsequently is told that he must pay over a portion of that profit to the government, such may be disappointing and may cause inconvenience, but it cannot imperil that person's financial position. Further, such persons are not in a position to claim reliance on or change of position with respect to existing law, as to such a retroactive income tax. It scarcely lies in the mouth of a person who has been operating profitably to say that had he known that his net income would have been taxed, he would have reduced his profits or gone out of business. Such is contrary to human nature and to normal business practices.

A tax imposed upon the gross receipts of a business is an entirely different matter. Such a tax, which is imposed wholly without relation to profits, could, if retroactively imposed, mean the difference between a profit and a loss and could cause insolvency. Such a tax on the revenue from sales or services rendered is a part of the expenses of business, as much so as labor or material costs. The operator of a business must determine his probable costs, including

such a gross receipts tax, in arriving at the overall cost of his product or services and fix a selling price or charge that will meet and exceed those costs. On the basis of such an analysis he determines whether the necessary price or charge will exceed what the traffic will bear, and if it does, whether he should continue to operate at a loss or go out of business.

These costs, therefore, including such a tax on gross receipts, are the facts upon which he relies and changes his position. If such a tax is given retroactive effect for any substantial period of time, it can be disastrous to the entrepreneur's financial position. Such can impose upon him a serious loss that he could have avoided had he been informed beforehand, but which now it would be impossible for him to recoup.

It is well settled that a tax may not be imposed upon the making of gifts and given retroactive effect. The cases are collected in annotations in 112 A.L.R. 1449, 124 A.L.R. 873, and 133 A.L.R. 987. This is because the donor makes his gift upon the basis of the facts and legal affects existing at the time of the gift. Making a gift at a time when no tax thereon is imposed on the donor is an entirely different matter than making such gift subject to a tax. Accordingly, the donor can justifiably say, where an attempt is made to give retroactive effect to a gift tax, that had he known such tax would be imposed he would not have made the gift. Therefore, the government cannot change retroactively the tax situation which existed and upon which the donor relied when he made the gift. As was said in *Welch vs. Henry,* supra:

"In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. * * * Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process." (305 U. S., at page 147.)

Turning now to the instant gross receipts tax, it is obvious that this is a tax which falls in the gift tax category, rather than in the niche of an income tax. Here is a tax which forms a part of the cost of doing business and upon which the businessman necessarily relies in making the voluntary choice of whether he will do business and on what basis. The injustice in imposing such a tax retroactively is well stated in *Safford vs. Metropolitan Life Ins. Co.*, 119 Oh. St. 332, 164 N. E. 351, 352 (1928) (where a tax on the privilege of engaging in the insurance business, measured by gross premiums, was involved), as follows:

"As attempted to be enforced * * * the amended law would exact an increased charge * * * for the privilege of doing business during

the previous year, *a privilege fully exercised and enjoyed, and for which the price to be charged had been fixed and announced in advance . . . To add such new additional charge for a privilege subsequent to the expiration of the period covered thereby would clearly be unfair and unjust.*" (Emphasis supplied)

The objections to a retroactive increase of such a privilege tax are even stronger in the case of a tax like the instant one. It must be remembered that the instant tax, if it is to be sustained at all, can be sustained as against an interstate carrier solely on the basis that it is an exaction for road use—that it is a charge, like license fees or tolls, for the use of the highways in conducting business.

An interstate carrier and the Interstate Commerce Commission, in the exercise of its jurisdiction over his rates, in determining his costs and fixing his rates, necessarily must do so on the basis of all these charges as they then exist. If a State could impose such a charge at the end of a year and make it effective as to his operations throughout that year, it would impose irreparable loss, for the carrier cannot raise his rates retroactively. Such would change retroactively the situation upon which he justifiably relied in carrying on his interstate business and thereby deprive him of his property without due process of law.

Surely no one would seriously contend that the State, at the end of a year, could increase vehicular license fees and make owners pay such as of the be-

ginning of the year, when they obtained their license. Neither could it be contended that where a State imposes a fixed tax on distributors for the sale of gasoline, it could increase the amount thereof at the end of a year and make the distributor pay the added tax on all gasoline previously sold. Yet, the instant tax is of the same type, has the same purpose, and would be equally unfair and financially disastrous.

Of course, the State is entitled to say: *If* you use our highways we are going to charge you so much for that use, by way of license fees, mileage tax, etc. Here the prospective user can consider these charges and determine what his rates shall be, or decide whether it is worth his while to engage in the transportation business. It is an entirely different thing for the State to say to one who has been using the highways: *Since* you have used our highways in the past, we are going to charge you for that past use. Here the prospective user is effectively deprived of his right to make a choice. Here the State repudiates its representations as to what it was going to charge him for that use.

Such deprives the carrier of his property without due process of law, in violation of Article XIV of the Federal Constitution.

Wherefore, it is earnestly submitted that Appellee's Motion to dismiss the appeal should be denied; and that the judgment of the Supreme Court of Pennsylvania should be reversed and the Act of June 22, 1931, P. L. 694, as amended by the Act of December

27, 1951, P. L. 1761, be declared unconstitutional and void.

Respectfully submitted,
FRANK A. SINON,
RHOADS, SINON & READER,
GEORGE S. NORCROSS,
WARNER, NORCROSS & JUDD,
Counsel for Appellant.